Jurisdictional Statement

81-554

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In the Supreme Court of the United States

OCTOBER TERM, 1980

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT

v.

STATE OF WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED*

Whether Congress violated the Tenth Amendment in 1974 when it amended Section 11(b) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 630(b), to include state and local governments within the coverage of the Act.

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* Additional defendants below were: Ed Herschler, individually and as Governor of the State of Wyoming and as ex officio member of the Wyoming Game and Fish Commission; the State of Wyoming Game and Fish Department; Earl M. Thomas, individually and as Director of the State of Wyoming Game and Fish Department; John Anselmi, individually and as President of the State of Wyoming Game and Fish Commission; J.W. "Wes" Myers, individually and as Vice President of the State of Wyoming Game and Fish Commission; Verne Barton, Jr., individually and as a member of the State of Wyoming Game and Fish Commission; Dave Wheeler, individually and as a member of the State of Wyoming Game and Fish Commission; Alice Hayes, individually and as a member of the State of Wyoming Game and Fish Commission; Fran Osborn, individually and as a member of the State of Wyoming Game and Fish Commission; Gene Bombi, individually and as a member of the State of Wyoming Game and Fish Commission; and The Wyoming Retirement System.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-13a) is reported at 514 F. Supp. 595.

JURISDICTION

The judgment of the district court (App. B, *infra*, 14a-15a) was entered on May 22, 1981, and the notice of appeal (App. C, *infra*, 16a-17a) was filed on June 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution, the Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 621 *et seq.*, and the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Wyo. Stat. § 31-3-101 *et seq.* (1977), are set forth in App. D, *infra*, 18a-19a.

STATEMENT

1. The Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 621 *et seq.*, prohibits employers from discriminating on the basis of age against employees between the ages of 40 and 70 years by, *inter alia*, discharging them or requiring them to retire involuntarily. Sections 4(a)(1), 4(f)(2) and 12(a) of the Act, 29 U.S.C. 623(a)(1), 623(f)(2) and 631(a). In 1974, Congress amended the Act to extend its prohibitions against age discrimination in employment to state and local government employers. The Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Wyo. Stat. § 31-3-101 *et seq.* (1977), permits the involuntary retirement of Wyoming Game and Fish Department employees as early as age 55 and imposes mandatory retirement at age 65 (Wyo. Stat. § 31-3-107(c) and (d) (1977)).

On January 25, 1980, Bill Crump, who was employed as a District Game Division Supervisor by the Wyoming Game and Fish Department, and who was retired involuntarily at age 55, filed a charge of unlawful age discrimination with the Equal Employment Opportunity Commission (Compl. ¶ 9).[1] On

[1] The Equal Employment Opportunity Commission is the agency charged with enforcing the Act. See Section 2 of Reorg. Plan No. 1 of 1978, 92 Stat. 3781.

November 10, 1980, following unsuccessful attempts at conciliation, the Commission brought this action in the United States District Court for the District of Wyoming, alleging that the state's retirement policy violated the federal Act. The Commission sought declaratory relief, as well as back pay and liquidated damages for persons adversely affected. Appellees, the State of Wyoming and various individual state officials, moved to dismiss the complaint on the ground that the Act is unconstitutional as applied to the states.

2. The district court dismissed the Commission's complaint on the ground that Congress had violated the Tenth Amendment when it extended coverage of the Act to prohibit age discrimination by state and local governments (App. A, *infra*, 1a-13a). The court found that the 1974 Congress had relied only on its power under the Commerce Clause (Article I, Section 8, Clause 3), and not on the Fourteenth Amendment, in enacting this provision (App. A, *infra*, 10a-11a).[2] Relying on this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the court held that Congress' determination to bring state governments within the coverage of the Act violated the Tenth Amendment because it impaired, altered or displaced state policies or functions essential to the separate and independent existence of the states (App. A, *infra*, 11a-12a). Finally, the district court rejected the argument that the state interest in managing personnel matters was outweighed by the national interest in prohibit-

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[2] In moving to dismiss, appellees also argued that the Act, "even if passed under the Fourteenth Amendment, cannot apply here where there is no impermissible violation of that amendment's equal protection provisions" (App. A, *infra*, 2a). The district court did not reach this issue because of its view that the Act rests only upon the Commerce Clause.

ing age discrimination in employment, relying on Congress' alleged "inconsistency" in permitting the involuntary retirement of certain federal employees, while denying the same discretion to the states (App. A, *infra*, 12a-13a).

THE QUESTION IS SUBSTANTIAL

The district court held that Congress violated the Tenth Amendment in 1974 in extending the protection of the Age Discrimination in Employment Act of 1967 to persons employed by state and local governments. Thus, this case presents fundamental constitutional questions concerning the proper allocation of powers between the national government and the states within our federal system.

Congress' action in extending to state employees the protection of federal legislation prohibiting age discrimination is valid under two constitutional grants of authority. First, Section 5 of the Fourteenth Amendment permits Congress, for purposes of implementing the constitutional guarantee of equal protection of the laws, to intrude "into * * * spheres of autonomy previously reserved to the States." *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976). Second, the federal Act, which prohibits arbitrary treatment of persons based on age, is a valid exercise of the commerce power. Because the Act does not impair functions basic to the separate and independent existence of the states, it does not conflict with the Tenth Amendment. See *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

With the exception of the court below, every court that has considered the question has held the Act constitutional as applied to state governments as employers (see page 10, *infra*). Because the decision below represents an unsupported impairment of federal supremacy and threatens to deprive a substantial number of employees of protections that Con-

gress has established, review by this Court is warranted.

1. Section 1 of the Fourteenth Amendment prohibits the states from making laws that "deny to any person * * * the equal protection of the laws," and Section 5 grants Congress the "power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]" by specifically prohibiting certain legislative classifications that deprive individuals of that right. Thus, as this Court has long held, the Fourteenth Amendment is a "limitation * * * of the power of the States and [an] enlargement * * * of the power of Congress." *Ex parte Virginia*, 100 U.S. 339, 345 (1879). Accord, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455-456 (1976). Congressional power under Section 5 of the Fourteenth Amendment, as opposed to the Commerce Clause, is not restricted by the Tenth Amendment. See *Hodel* v. *Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981), slip op. 20-21 n.28; *City of Rome* v. *United States*, 446 U.S. 156, 159 (1980); *Milliken* v. *Bradley*, 433 U.S. 267, 291 (1977); *Blake* v. *City of Los Angeles*, 595 F.2d 1367, 1373-1374 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); *United States* v. *City of Chicago*, 573 F.2d 416, 422-424 (7th Cir. 1978); *Usery* v. *Allegheny County Institution District*, 544 F.2d 148, 154-156 (3d Cir. 1976). See also *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 456; *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852 n.17.

Although the state retirement provisions at issue here might well pass muster under the Equal Protection Clause of the Fourteenth Amendment (see *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976)), that fact does not dispose of the question whether Congress may constitutionally require more, because Section 5 authorizes "Congress

to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966). Cf. *City of Rome* v. *United States*, *supra*, 446 U.S. at 176-178.[3] Under Section 5, legislation is "appropriate legislation" to enforce the provisions of the Fourteenth Amendment if it is (1) a measure to enforce rights protected by the Fourteenth Amendment, (2) plainly adapted to that end, and (3) consistent with the letter and the spirit of the Fourteenth Amendment. *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 651.

The federal Act enforces rights granted by the Fourteenth Amendment by protecting individuals against adverse employment decisions based upon an arbitrary classification. Like arbitrary classifications based on race, sex or religion, classifications based on age impermissibly disadvantage individuals by substituting stereotyped class-based assumptions for determinations based on individual merit. See *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 709-710 (1978).[4] After extensive

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[3] Thus, the Equal Protection Clause does not itself prohibit a state's use of employment tests having a racially disproportionate impact (*Washington* v. *Davis*, 426 U.S. 229 (1976)) or veterans' preferences having a disproportionate impact on persons of one sex (*Personnel Administrator of Massachusetts* v. *Feeney*, 434 U.S. 884 (1977)), but Section 5 of the Fourteenth Amendment authorizes Congress to prohibit the use of such devices if such a prohibition would constitute " 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment." *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 456. Accord, *Blake* v. *City of Los Angeles*, *supra*, 595 F.2d at 1372-1373; *United States* v. *City of Chicago*, *supra*, 573 F.2d at 422-424.

[4] As the Fifth Circuit has noted, "[w]ith a few minor exceptions the prohibitions of [the Age Act] are in terms identical to those of Title VII of the Civil Rights Act of 1964 [42

study of age discrimination in the United States, Congress made explicit findings concerning this problem and the need for legislation (Section 2 of the Act, 29 U.S.C. 621):

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
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> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the

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U.S.C. 2000e *et seq.*] except that 'age' has been substituted for 'race, color, religion, sex, or national origin.'" *Hodgson v. First Federal Savings & Loan Association*, 455 F.2d 818, 820 (1972) (Tuttle, J.) (footnote omitted). Indeed, Congress first considered enacting legislation to prohibit age-based discrimination during the legislative process that culminated in the enactment of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 *et seq.* See *Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess., Pt. III, 2282-2290, 2298 (1963); H.R. Rep. No. 914, 88th Cong., 1st Sess. 15 (1963); 110 Cong. Rec. 2596-2599, 9911-9914, 13490-13492 (1964). However, because of Congress' concern that the particular problems associated with age discrimination should be explored more fully (110 Cong. Rec. 2596-2597 (1964) (remarks of Rep. Celler)), Congress directed that the Secretary of Labor should study the issue prior to the enactment of any such legislation (Section 715 of Title VII, Pub. L. No. 88-352, 78 Stat. 265).

younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

In 1974, when Congress amended the Act to extend its coverage to individuals employed by state and local governments, Congress clearly assumed that this legislation was authorized under both Section 5 of the Fourteenth Amendment and the Commerce Clause.[5] Congress first expressed an intent to protect state and local government employees from age discrimination in 1972, at the time that it amended Title VII of the Civil Rights Act of 1964 to bring state and local government employees within the coverage of that statute. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, Section 2, 86 Stat. 103, 42 U.S.C. 2000e(f). Following the enactment of the 1972 amendments to Title VII, Senator Bentsen proposed a similar amendment to extend the

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[5] Of course, under Article I of the Constitution, Congress is not required to state specifically the constitutional basis for legislation that it enacts, and the courts will sustain the constitutionality of a statute if Congress had the constitutional power to legislate. *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 653; *Keller* v. *United States*, 213 U.S. 138, 147 (1909).

coverage of the Age Act to include public employees. See S. 3318, 92d Cong., 2d Sess. (1972); 118 Cong. Rec. 7746 (1972). In introducing this bill, Senator Bentsen specifically referred both to the Title VII amendments and to S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971), which expressly premised Congress' authority to prohibit discriminatory practices by state and local governments upon Section 5 of the Fourteenth Amendment, and upon which this Court relied in *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 453 n.9. Senator Bentsen stated (118 Cong. Rec. 15895 (1972)):

> I believe that the principles underlying these provisions in the EEOC bill are directly applicable to the Age Discrimination in Employment Act.

The provision proposed by Senator Bentsen was included in the Fair Labor Standards Act bill that was reported by the Committee on Labor and Public Welfare (S. Rep. No. 92-842, 92d Cong., 2d Sess. 93-94 (1972)), and it remained unchanged when the bill was finally enacted into law in 1974.[6] Cf. *Lehman* v.

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[6] The 1972 bill was not enacted, but the same provisions were eventually included in the House and Senate bills reported out of committee in 1974. See H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 16, 40-41 (1974); S. Rep. No. 93-690, 93d Cong., 2d Sess. 55-56 (1974). These provisions remained in the final enactment. See Pub. L. No. 93-259, Section 28(a), 88 Stat. 74. Significantly, both the House and Senate Committee Reports quoted with approval the President's message of March 23, 1972, in which he stated: "Discrimination based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employ-

Nakshian, No. 80-242 (June 26, 1981), slip op. 10-11 n.14. Although the legislative history of this provision is not extensive, it clearly shows that Congress relied on its authority under Section 5 of the Fourteenth Amendment in extending coverage of the Age Act to employees of state and local governments. With the exception of the court below, every court that has addressed the issue has concluded that Congress' 1974 extension of the Age Act to protect state and local government employees against age discrimination is "appropriate legislation" to enforce the Fourteenth Amendment. See *Arritt* v. *Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Marshall* v. *Delaware River & Bay Authority*, 471 F. Supp. 886, 891-892 (D. Del. 1979); *Remmick* v. *Barnes County*, 435 F. Supp. 914, 916 (D.N.D. 1977), *Aaron* v. *Davis*, 424 F. Supp. 1238, 1241 (E.D. Ark. 1976); *Usery* v. *Board of Education of Salt Lake City*, 421 F. Supp. 718, 720-721 (D. Utah 1976); *Carpenter* v. *Pennsylvania Liquor Control Board*, 508 F. Supp. 148 (E.D. Pa. 1981); *EEOC* v. *Calumet County*, 26 Fair Empl. Prac. Cas. 20, 26 Empl. Prac. Dec. ¶ 31,955 (E.D. Wis. 1981); *Johnson* v. *Mayor & City Council of Baltimore*, 26 Fair Empl. Prac. Cas. 44 (D. Md. 1981).

2. Congress' prohibition of age discrimination by state and local governments is also appropriate legislation under the commerce power, notwithstanding the provisions of the Tenth Amendment, and there is no merit to the district court's view that a contrary conclusion is required by this Court's decision

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ment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the Nation the contribution they could make if they were working." H.R. Rep. No. 93-913, *supra*, at 40; S. Rep. No. 93-690, *supra*, at 55.

in *National League of Cities* v. *Usery*, *supra*. In *National League of Cities*, the Court held that the 1974 amendments to the Fair Labor Standards Act, which "extended the minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions" (426 U.S. at 836), were unconstitutional because they "directly supplant[ed] the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment" (*id.* at 848). The Court observed that the amendments sought "to regulate directly the activities of States as public employers" (*id.* at 841) and spoke "directly to the States *qua* States" (*id.* at 847). Finding that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime" (*id.* at 845), the Court concluded that "the challenged amendments operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions * * *" (*id.* at 852) and therefore "would impair the States' 'ability to function effectively in a federal system' " (*ibid.*, quoting *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975)) and intrude upon state " 'functions essential to separate and independent existence' " (426 U.S. at 845, quoting *Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911), and *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868)).

The issue presented here is the very different question whether, by virtue of the Tenth Amendment, Congress lacks the power to require that the states,

like other employers, shall not disregard the rights of employees to be free from invidious discrimination. As this Court has made clear, the Tenth Amendment prohibits Congress from regulating only those fundamental employment decisions that are essential to the separate and independent existence of the states. *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 851; cf. *Hodel* v. *Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981), slip op. 21. The effect upon the states of the Age Act's prohibition of arbitrary age-based discrimination is obviously different and more limited than the effect of the statute at issue in *National League of Cities;* the effect here is merely incidental and does not interfere with the state's ability to determine the number, functions, and salary levels of state employees or with any other legitimate power necessary to the independent existence of the states.[7] See *Marshall* v.

[7] In *National League of Cities* v. *Usery*, *supra*, the evidence showed that application of federal minimum wage requirements to the states would have necessitated both the restructuring of entire departments and the elimination of entire functions of state governments (426 U.S. at 846-852). By contrast, Wyoming has not argued, and it is certainly not apparent here, that application of the Age Act will have any such adverse budgetary impact upon the states. In its briefs below, Wyoming merely advanced the argument that Congress had intruded into an area that was traditionally the domain of the states. See Br. in Support of Motion to Dismiss at 6. In view of the State's failure to make any showing of adverse economic impact, and the fact that the Age Act does not require the retention of any employee who is unable to perform his or her job, or prohibit nondiscriminatory reductions in force, there is no basis whatsoever for the district court's finding that "the State could be saddled with greater economic responsibilities in keeping its law enforcement personnel on its payrolls an additional 10 years" (App. A, *infra*, 12a).

Delaware River & Bay Authority, 471 F. Supp. 886, 892 (D. Del. 1979). Cf. *Marshall* v. *City of Sheboygan*, 577 F.2d 1, 6 (7th Cir. 1978) (the Equal Pay Act of 1963, 29 U.S.C. 206(d), does not impermissibly restrict the ability of the states to structure their own employment relationships because the Act requires only that the substantive terms of employment not be determined in an arbitrary or discriminatory manner).

The Age Act does not limit the authority of the states to retire or discharge older employees who are unable to perform their jobs. Indeed, the Act specifically includes a bona fide occupational qualification exception (Section 4(f)(1) of the Act, 29 U.S.C. 623(f)(1)) which Wyoming has not asserted in this case. See *EEOC* v. *Florissant Valley Fire Protection District*, 21 Fair Empl. Prac. Cas. 973, 975, 21 Empl. Prac. Dec. ¶ 30,520, at 13,805 (E.D. Mo. 1979) ("To the extent that a state could not show that age was a BFOQ, it is difficult to see how the state could legitimatize its interest in maintaining discriminatory employment practices and policies within their [*sic*] traditional structure of employer-employee relationships").

Finally, even when, pursuant to the commerce power, Congress affects the states' ability to structure integral operations in areas of traditional state functions, the Tenth Amendment does not require that state prerogatives be held absolute. In such cases, as the Court recognized in *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852-853, the federal statute must be upheld if federal interests outweigh those of the states. See also *id.* at 856 (Blackmun, J., concurring); *Fry* v. *United States*, 421 U.S. 542 (1975). Under this analysis, Congress' extension of the Age Act to state governments is an appropriate exercise

of its authority under the Commerce Clause because the national interest in protecting individuals from age-based discrimination far outweighs any legitimate interest that the states may have in requiring the retirement of productive employees simply because they have passed an arbitrary milestone in life. See *Usery* v. *Board of Education of Salt Lake City*, 421 F. Supp. 718, 719-720 (D. Utah 1976).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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SEPTEMBER 1981

Appendix

APPENDIX A

UNITED STATES DISTRICT COURT
D. WYOMING

No. C80-0336B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

THE STATE OF WYOMING, ET AL., DEFENDANTS

May 22, 1981

MEMORANDUM OPINION

BRIMMER, District Judge.

The Equal Employment Opportunity Commission, as an agency of the United States (herein "EEOC"), sued the State of Wyoming, its Governor, and the members and directors of the Wyoming Game and Fish Commission, both as individuals and in their official capacities, the Director of the State of Wyoming Game and Fish Department, as an individual and officially, and the State of Wyoming Retirement System, on behalf of Bill Crump and others similarly situated, as a result of Crump's mandatory retirement at the age of fifty-five (55) years from his position of District Game Division Supervisor of the Wyoming Game and Fish Department. Its complaint alleges willful engagement by each of the Defendants in unlawful employment practices in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. (herein referred to as "ADEA"), in that (a) Wyoming Statute § 31-3-107, entitled the Wyoming State High-

way Patrol and Fish Retirement Act, invalidly and contrary to ADEA permits mandatory retirement of a game warden at 55 years, (b) Crump was mandatorily retired at age 55, and (c) the policy of retiring game wardens at age 55 and other employees at age 65 is discriminatory and adversely affects numerous employees of the Wyoming Game and Fish Department. The Defendants moved to dismiss the complaint for failure to state a claim because: (1) ADEA cannot apply to a State's system for retirement of law enforcement personnel under the Tenth Amendment to the United States Constitution, citing *National League of Cities* v. *Usery*, 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct. 2465 (1976); and (2) ADEA, even if passed under the Fourteenth Amendment, cannot apply here where there is no impermissible violation of that amendment's equal protection provisions.

The EEOC's prayer asked for injunctive and declaratory relief, and for reinstatement of Crump and sought "appropriate back wages and an equal sum as liquidated damages, in amounts to be proved at trial, to persons adversely affected by the unlawful employment practices . . . including Bill Crump and others similarly situated." No certification of the suit as a class action has yet been asked.

The naming of the Defendants in their individual capacities as well as officially disturbs the Court. EEOC has sued 9 citizens of this State as individuals for damages. It used the barest notice pleading, alleging only willful engagement by each of the Defendants in "unlawful employment practices." It affronts this Court's sense of justice and fair play that a federal agency should attack as individuals, the Governor of Wyoming and the Wyoming citizens who serve this State in a public-spirited

capacity without pay as State Game and Fish Commission members, and attempt to extract an unspecified amount of damages from them without so much as a single specific allegation, statement or showing that they as individuals have acted with malice, or in bad faith, or have in some way abused their offices so as to subject them to individual liability. The Defendants, as Governor, Director, and Commission members, are entitled to a qualified privilege or immunity from suit as individuals. *Smith* v. *Losee*, 485 F.2d 334 (10th Cir., 1973). The EEOC complaint clearly has failed to state a cause of action against the Defendants as individuals. "The task of protecting the individual against the aggressions of government," as Prof. Archibald Cox has termed it,[1] falls to this Court and the Court therefore dismisses this action, sua sponte, against the Defendants as individuals.

The claims against the Defendants in their official capacity are in fact claims against the State of Wyoming. *Williams* v. *Eaton*, 443 F.2d 422, 428 (10th Cir., 1971), *Smyth* v. *Ames*, 169 U.S. 466, 518, 18 S.Ct. 418, 422, 42 L.Ed. 819, and the Defendants will hereafter be referred to collectively as the State of Wyoming or the State. In defense of this action the State contends that EEOC's claims against the State are based on an Act of Congress (the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.) passed under the Commerce Clause power of Congress, and are therefore an impermissible interference under the Tenth Amendment with the State of Wyoming under the authority of *National League of Cities* v. *Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49

[1] Archibald Cox, *The Role of the Supreme Court in American Society*, 50 Marq.L.R. 575, 582 (1967).

L.Ed.2d 245 (1976). EEOC in reply contends that *National League of Cities* v. *Usery*, supra, merely struck down the minimum wage and overtime provisions of the Fair Labor Standards Act and did not affect the ADEA. It urges also that the extension of ADEA to State employees was a valid exercise of Congressional power under the Commerce Clause because the State's ability to establish age 55 for retirement of some of its employees in law enforcement work is not an attribute to its sovereignty, and finally that the Fourteenth Amendment provides a source of Congressional power supporting ADEA's application to the States.

A basic inconsistency in the United States' position is unusually striking. In the very recent case of *Thomas* v. *U.S. Postal Inspection Service*, 647 F.2d 1035 (10th Cir. 1981) the Court of Appeals confirmed that the Postal Service, ADEA notwithstanding, could fix minimum and maximum ages within which law enforcement officers may be employed. It relied upon the case of *Vance* v. *Bradley*, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979) which held that a requirement of retirement of Foreign Service personnel at age 60 was not violative of Fifth Amendment equal protection. Judge Pickett in *Thomas*, supra, also pointed out that, "In 1974, Congress, recognizing the hazardous nature of the work of law-enforcement officers and others, amended the retirement provisions relating to such employment. P.L. 93-350, 1 U.S. Cong. & Adm.News 1974, 395. This Act requires retirement at the age of fifty-five years. 5 U.S.C. § 8335(b)." Thus, the United States Postal Service, the United States Foreign Service, as well as its law enforcement agencies ignore the provisions of ADEA, but the United States, through its

EEOC, won't allow the law enforcement agencies of one of its sovereign States also to be immune from ADEA. In one breath Congress in 1974 required federal law enforcement men to retire at 55 years, but in a second breath Congress in 1974 extended ADEA coverage to the States; thus, the United States tells the State and its law enforcement agencies to do as the United States says, but not as it does.

The Supreme Court in *Massachusetts Board of Retirement et al.* v. *Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), has held that a Massachusetts statute mandating retirement of a state police officer at 50 years rationally furthered its purpose of assuring the physical fitness of its state police officers. It said,

> "This Court's decisions give no support to the proposition that a right of governmental employment *per se* is fundamental . . . Accordingly, we have expressly stated that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities' . . ."

The Court went on to hold that ". . . the Massachusetts statute clearly meets the requirements of the Equal Protection Clause." This Court assumes that the Wyoming statutes in question would similarly withstand challenge on Equal Protection grounds. Applicability of ADEA was not considered in *Murgia*, supra.

The Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, § 31-3-101, W.S. 1977, et seq., allows retirement of fulltime law enforcement officers of the Wyoming State Game and Fish Department and Wyoming Highway Patrol-

men at age 55 and requires retirement at age 65. § 31-3-107(c) and (d), W.S., 1977. Wyoming Game and Fish wardens are law enforcement officers, § 9-3-1901(a)(vii) and § 7-2-101, W.S. 1977, and are authorized to make arrests and enforce criminal violations of Wyoming game and fish laws. § 23-6-101, W.S., 1977. The State's answers to interrogatories filed herein show that the Wyoming Game and Fish Commission on November 3, 1977 adopted a policy of mandatory retirement at age 55, unless the employee served in an administrative function. The Table of Organization of the Game Division of the State Game and Fish Department shows 7 district supervisors, each in direct charge of the game wardens under them. The Court must conclude that Mr. Crump is a law enforcement officer of the State of Wyoming, and not a mere administrative employee.

That the Supreme Court's holding in *National League of Cities* v. *Usery*, supra, is not narrowly limited to the minimum wage and hour provision of the Fair Labor Standards Act (FLSA), which it struck down, is readily apparent. A thoughtful reading of the case as well as the furor in academic circles created by the decision discloses that. Surely a case first attacked by Justice Brennan in his vigorous dissent as "an abstraction without substance" (426 U.S. at 860, 96 S.Ct. at 2478), then characterized as a "vestigal expression of states' rights philosophy," [2] and as "the tip of the tenth amendment iceberg" by another,[3] and "ominous" and "outra-

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[2] Barber, *National League of Cities* v. *Usery, New Meaning for the Tenth Amendment*, 1976 Sup.Ct.Rev. 161.

[3] Heldt, *The Tenth Amendment Iceberg*, 30 Hastings L.J. 1965.

geous" by yet another,[4] and as "a retreat from the vigorous defense of liberty and equality" by Professor Tribe of Harvard,[5] has greater impact than a ban on Congressional interference with wages and hours of State employees working in traditional State activities. The decision's language and argument are cast in broader terms.

In *National League of Cities* v. *Usery*, supra, Justice Rehnquist, writing for a five to four majority, held that the 1974 FLSA Amendments which broadened the coverage of the FLSA to encompass employees of a State or a political division thereof were an attempt by Congress "to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments," and said,

> "In so doing, Congress has sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system'. Fry [v. U.S.], 421 U.S. [542] at 547, n. 7 [95 S.Ct. 1792, at 1795, 44 L.Ed.2d 363] . . . We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions, they are not within the authority granted Congress . . .",

under the Commerce Clause. He concluded that the FLSA amendments operated directly on "the States *qua* States" but that "particularized assessments of

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[4] Prof. Frank I. Mickelman, *States' Rights and States' Roles*, 86 Yale L.J. 1165 at 1192.

[5] Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Service*, 90 Harvard L.R. 1065.

actual impacts" are not crucial to resolution of the issue, that "there are limits upon the power of Congress to override state sovereignty," rejected and overruled the reasoning of *Maryland* v. *Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) and its "far-reaching implications" as "no longer authoritative". He concluded that where the States exercise "integral governmental functions" that provides services "which the States and their political subdivisions have traditionally afforded their citizens," the Tenth Amendment was a "constitutional barrier" and limitation upon Congress' power to regulate commerce. One writer concluded, as do we,

> "The broad invalidation of the Amendments without a specific analysis of their actual impact suggests that *National League* has potentially sweeping implications with respect to all aspects of the FLSA as applied to the States," 10 *Univ. of Michigan Journal of Law Reform*, 239 at 248.

It is sheer ostrichism to say the *National League of Cities* merely struck down the wage-hour provisions of FLSA without affecting ADEA.

Nor is there any gainsaying the fact that ADEA was passed by Congress under the Commerce Clause, rather than the Fourteenth Amendment. Despite the holdings of our learned brothers in *Arritt* v. *Grisell*, 567 F.2d 1267 at 1271 (4th Cir., 1977), *Aaron* v. *Davis*, 424 F.Supp. 1238 at 1241 (E.D.Ark., 1976), and *Usery* v. *Board of Education of Salt Lake City*, 421 F.Supp. 718 (D.Utah, 1976), and other similar cases, the legislative history of the ADEA clearly shows that in enacting the ADEA, and in extending it to the states, Congress was acting under the Com-

merce Clause and not under § 5 of the Fourteenth Amendment.

The Fair Labor Standards Act of 1938 was enacted under the Commerce Clause. *U.S.* v. *Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941). Its coverage was extended in 1961 by P.L. 87-30, 75 Stat. 65, 29 U.S.C. § 203(s), and in 1966 when it was extended to state and local government workers employed in hospitals and health care institutions, special schools and local transit operations (P.L. 89-601, 80 Stat. 830). ADEA was enacted in 1967 as P.L. 90-202, 81 Stat. 602 and it said,

> "The Congress hereby finds and declares that . . . the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce." 29 U.S.C. § 621(a)(4).

"Employer" was defined as "a person engaged in an industry affecting commerce . . ." 29 U.S.C. § 630(b).

The Fair Labor Standards Amendments of 1974, P.L. 93-259, 88 Stat. 55, redefined "public agency" to include the government of a State or an instrumentality of a state, thereby extending coverage to nearly all state and local government employees. Section 626(b) provides:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as

> a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title:

The Plaintiff alleged in its complaint that ADEA incorporated by reference the enforcement provisions of the FLSA.

The committee reports from both the Senate and House of Representatives on the ADEA do not discuss the role of the Fourteenth Amendment with respect to age discrimination but rather state that arbitrary discrimination in employment based on age burdens commerce and the free flow of goods in commerce. See H.R.Rep. No. 805, 90th Cong., 1st Sess. (1967), U.S.Code Cong. & Admin.News, 2213 and S.Rep. No. 723, 90th Cong., 1st Sess., 13 (4 Nov. 1967). There is not a word or even a smidgen in the 1974 amendments to the ADEA or the legislative history of the amendments supporting the contention that Congress was exercising its powers under the Fourteenth Amendment. To the contrary, the policies reflected by the amendments are exclusively couched in terms of commerce. See S.Rep. No. 690, 93rd Cong., 2nd Sess., 55 (22 Feb. 1974); H.R.Rep. No. 913, 93rd Cong., 2nd Sess. (15 Mar. 1974), U.S. Code Cong. & Admin.News, 2811 and Cong. Record Vol. 120 (1974)—Dates of consideration and passage: Senate, March 7 and 18, 1974 and House, March 20 and 28, 1974). *Expressio unius est exclusio alterius.*

In the most recent Supreme Court case of *Pennhurst State School* v. *Halderman*, —— U.S. ——, 101 S.Ct. 1531, 67 L.Ed.2d —— (1981), Justice Rehnquist says,

> "Because such legislation imposes congressional policy on a State involuntarily, we should not

quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."

In *Pennhurst*, supra, which cites *National League of Cities*, supra, with approval, the majority notes that in cases going to Congress' power to secure guarantees under the Fourteenth Amendment, such as *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1975), Congress "expressly articulated its intent to legislate pursuant to § 5." Justice Blackmun's concurrence referred to matters other than the majority view relating to the Fourteenth Amendment and Justice White's dissent, concurred in by Justices Brennan and Marshall, said ". . . it should not be lightly assumed that Congress acted pursuant to its power and Section 5 in passing the Act. Here, there is no conclusive basis for determining that Congress acted pursuant to Section 5."

Because we, too, find nothing in the 1974 FLSA Amendments or their legislative history to suggest that Congress acted pursuant to any other power than the Commerce Clause, because the 1974 Act nowhere states that Congress was acting pursuant to its power to enforce the Fourteenth Amendment, and because ADEA is inextricably bound to FLSA, a Commerce Clause Act, by Congress' own action of intertwining ADEA's enforcement power with that of FLSA, we likewise conclude that this act was passed only under the Commerce Power of Congress.

Having concluded that ADEA was authorized by the Commerce Clause, the issue then is whether Congress, as in *National League of Cities*, supra, has impaired, altered or displaced State policies or functions essential to its separate and independent existence. In *National League of Cities*, supra, the Court

said of the minimum wage and maximum hour provisions of FLSA,

> ". . . their application will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, *police protection*, sanitation, public health, *and parks and recreation*. . . . Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens." (Emphasis supplied).

The management of wildlife resources by State game wardens, with powers of arrest, is surely a long-standing, traditional service of government. In *Murgia*, supra, and in *Thomas*, supra, it was recognized that compulsory retirement for law enforcement officers is a classification that is a legislative task, permissible under the Equal Protection Clause which "recognized the need for comparatively young, strong and vigorous personnel in law enforcement departments." *Thomas* v. *Postal Inspection Service*, supra. Any such policy of the State would be negated by the application to it of ADEA; the State could be saddled with greater economic responsibilities in keeping its law enforcement personnel on its payrolls an additional 10 years. Thus, an integral portion of government services which the States and their political subdivisions have traditionally afforded their citizens would be affected, contrary to the Tenth Amendment and to the holding of the *National League of Cities* v. *Usery*.

While the Plaintiff correctly urges that the Supreme Court in *National League of Cities*, supra, did not purport to limit all exercise of Commerce Clause

power against the States, as shown by its approval of *Fry* v. *United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975), EEOC's argument that there is a national interest that "looms larger when balanced against Defendants' nominal interest in discriminating against its employees on the basis of age" has a hollow ring to it when the basic inconsistency of the United States is considered. How can there be a supervening national interest when the Nation itself requires mandatory retirement of its law enforcement personnel? We believe that Justice Blackmun's concurrence on the understanding that the *National League* majority was adopting a "balancing approach" provides the key to a correct understanding of *National League*, namely, that the Courts must use an ad hoc balancing test of weighing the national interest and policy against the State activity sought to be displaced by the federal regulation. Here, Justice Rehnquist's own references to the police protection and parks and recreation as typical State services traditionally rendered by States plus the inconsistency of the United States, require us to strike the balance for the State. It is

ORDERED that the complaint of the Plaintiff be, and it hereby is, dismissed with prejudice, Plaintiff to pay the costs of the parties incurred herein.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. C80-0336B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF

vs.

THE STATE OF WYOMING, ED HERSCHLER, individually and as Governor of the State of Wyoming and as ex officio member of the Wyoming Game and Fish Commission, THE STATE OF WYOMING GAME AND FISH COMMISSION, THE STATE OF WYOMING GAME AND FISH DEPARTMENT, EARL M. THOMAS, individually and as Director of the State of Wyoming Game and Fish Department, JOHN ANSELMI, individually and as President of the State of Wyoming Game and Fish Commission, J. W. "WES" MYERS, individually and as Vice President of the State of Wyoming Game and Fish Commission, VERNE BARTON, JR., individually and as a member of the State of Wyoming Game and Fish Commission, DAVE WHEELER, individually and as a member of the State of Wyoming Game and Fish Commission, ALICE HAYES, individually and as a member of the State of Wyoming Game and Fish Commission and FRAN OSBORN, individually and as a member of the State of Wyoming Game and Fish Commission, GENE BOMBI, individually and as a member of the State of Wyoming Game and Fish Commission, THE WYOMING RETIREMENT SYSTEM, DEFENDANTS

[Filed: May 22, 1981]

JUDGMENT

The Court having concurrently herewith filed its Memorandum Opinion, constituting its findings of fact and conclusions of law relating to the above-entitled matter and finding that the Motion to Dismiss of the Defendants should be granted, and the Complaint of the Plaintiff on file herein and the Amendment Complaint which was filed herein by the Plaintiff for the purpose of complying with the local rule of this Court requiring pleadings of a government agency to be signed by the United States Attorney for the District of Wyoming or one of the assistants, said Amendment Complaint being in all other particulars identical to the Complaint on file herein, should be dismissed and the Court being well-advised in the premises; it is

ORDERED, ADJUDGED AND DECREED that the Complaint and Amended Complaint of the Plaintiff be, and they are hereby, dismissed with prejudice, Plaintiff to pay all costs incurred herein.

Dated this 22nd day of May, 1981.

/s/ Clarence A. Brimmer
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C80-0336B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF

vs.

THE STATE OF WYOMING, ED HERSCHLER, individually and as Governor of the State of Wyoming and as ex officio member of the Wyoming Game and Fish Commission, THE STATE OF WYOMING GAME AND FISH COMMISSION, THE STATE OF WYOMING GAME AND FISH DEPARTMENT, EARL M. THOMAS, individually and as Director of the State of Wyoming Game and Fish Department, JOHN ANSELMI, individually and as President of the State of Wyoming Game and Fish Commission, J. W. "WES" MYERS, individually and as Vice President of the State of Wyoming Game and Fish Commission, VERNE BARTON, JR., individually and as a member of the State of Wyoming Game and Fish Commission, DAVE WHEELER, individually and as a member of the State of Wyoming Game and Fish Commission, ALICE HAYES, individually and as a member of the State of Wyoming Game and Fish Commission and FRAN OSBORN, individually and as a member of the State of Wyoming Game and Fish Commission, GENE BOMBI, individually and as a member of the State of Wyoming Game and Fish Commission, THE WYOMING RETIREMENT SYSTEM, DEFENDANTS

[Filed June 19, 1981]

NOTICE OF APPEAL

Equal Employment Opportunity Commission, the above named Plaintiff, by and through the United States Attorney, gives notice that it appeals the Judgment and Order granting defendants' Motion to Dismiss the Complaint filed May 22, 1981 and the Memorandum Opinion concurrently filed on May 22, 1981, to the United States Supreme Court on the authority of 28 U.S.C. § 1252, which authorizes direct appeals from decisions invalidating acts of Congress.

This Notice of Appeal is submitted in accordance with Rules 10 and 28 of the Supreme Court Rules.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

By: _____

TOSHIRO SUYEMATSU
United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 19th, 1981 I served a copy of the foregoing Notice of Appeal upon Bruce A. Salzburg, Esq., Senior Assistant Attorney General, State of Wyoming by placing a copy thereof in the United States Mails first-class postage prepaid and addressed to him at 123 Capitol Building, Cheyenne, Wyoming, 82001. By this service, all parties required to be served have been served.

_____

TOSHIRO SUYEMATSU
United States Attorney

APPENDIX D

1. Article I, Section 8, of the United States Constitution provides:

> The Congress shall have Power * * *
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *
>
> * * * * *
>
> —And
>
> To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

2. The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. The Fourteenth Amendment to the United States Constitution provides:

> Section 1.
>
> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * * nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. Section 4(a) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(a), provides in pertinent part:

> It shall be unlawful for an employer—
> (1) * * * to discharge any individual * * * because of such individual's age * * *.

5. Section 11(b) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 610(b), provides in pertinent part:

> The term "employer" means * * * a State or subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State * * *.

6. Section 31-3-107 of the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Wyo. Stat. § 31-3-107 (1977), provides:

* * * * *

> (c) An employee may continue in service on a year-to-year basis after age sixty (60), until June 30, 1977, and thereafter age fifty-five (55), with the approval of employer and under conditions as the employer may prescribe.
>
> (d) Any employee in service who has attained the age of sixty-five (65) years, shall be retired no later than the last day of the calendar month in which his 65th birthday occurs.

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Motion to Dismiss or Affirm

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No. 81-554

IN THE

Supreme Court of the United States

October Term, 1980

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

v.

STATE OF WYOMING, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

MOTION TO AFFIRM

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No. 81-554

IN THE

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant

v.

STATE OF WYOMING, ET AL.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

MOTION TO AFFIRM

Appellees in the above-entitled cause move to affirm on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, and the decision below is so obviously correct as to warrant no further review.

STATEMENT

1. This case arises under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, *et seq.*, which prohibits discrimination by employers on the basis of age against employees within the ages of 40-70 years. Although the Act as passed in 1967 defined "employer" as "a person engaged in an industry affecting commerce," in 1974, the Congress amended the definition to include states, political subdivisions of states, and their agencies and instrumentalities. 29 U.S.C. 630 and P.L. 93-259, Section 28(a)(1)-(4), 88 Stat. 74. The 1974 amendments also extended coverage of the Act to the

federal government. 29 U.S.C. 633a and P.L. 93-259, Section 28(b)(2), 88 Stat. 74. Since 1978, the Act prohibits, *inter alia*, the involuntary retirement of any individual within the protected class. 29 U.S.C. 623(f)(2) and P.L. 95-256, Section 2(a), 92 Stat. 189.

The Wyoming State Highway Patrol and Game and Fish Warden Retirement Act (the Patrol/Warden Plan) was passed by the Wyoming Legislature in 1973. Laws 1973, Ch. 157, Section 1, now § 31-3-101 *et seq.*, W.S. 1977. (See Jurisdictional Statement, Appendix D, p. 19a.) That act permits the involuntary retirement of Wyoming Game and Fish Wardens at age 55. § 31-3-107(c), W.S. 1977.

On January 25, 1980, Bill Crump, who was subject to the provisions of the Patrol/Warden Plan, and who had been involuntarily retired at age 55, filed his charge of unlawful age discrimination with the Equal Employment Opportunity Commission. After conciliation efforts were unsuccessful, the Commission filed suit against the state[1] in the United States District Court for the Distict of Wyoming. Appellees moved to dismiss the Complaint on the grounds that the 1974 amendments to the Act extending its coverage to the states exceeded Congress' power under the Commerce Clause of the United States Constitution; that the amendments could not be sustained under Congress' power provided by Section 5 of the Fourteenth Amendment; and, that Congress did not intend the Act to be applied on behalf of state law enforcement officers.

2. Relying on this Court's decision in *Pennhurst State School v. Halderman*, ____ U.S. ____, 67 L.Ed.2d 694 (1981), the District Court found that the Age Discrimination in Employment Act of 1967 was a Commerce Clause (Article 1, Section 8, Clause 3) empowered statute and, applying *National League of Cities v. Usery*, 426 U.S. 833 (1976), found the 1974

[1] The remaining Appellees are noted in the Jurisdictional Statement at (I).

amendments unconstitutional as a violation of the Tenth Amendment.

The District Court did not reach the question of whether the 1974 amendments exceeded Congress' Fourteenth Amendment powers, in view of its finding of a Commerce Clause power; however, the Court did note, as raised in the argument concerning congressional intent, that the 1974 Congress expressed its requirement of mandatory retirement at age 55 for federal law enforcement personnel. Therefore, if the Age Discrimination in Employment Act of 1967 were to be applied in an attempt to invalidate a state statute with the same requirements, a "basic inconsistency" would result. (Jurisdictional Statement, Appendix A., p. 4a.)

I.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 IS BASED UPON THE CONGRESS' COMMERCE POWER AND CANNOT BE ENFORCED AGAINST THE STATE OF WYOMING IN THE FACE OF THE TENTH AMENDMENT.

In order to determine which source of power was utilized by the Congress in enacting the Age Discrimination in Employment Act of 1967 (ADEA), the history of the Act must be examined.

The ADEA was enacted in 1967, P.L. 90-202, Section 2, 81 Stat. 602, and provided:

> The Congress hereby finds and declares that —
>
> * * *
>
> the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. 621(a)(4).

As stated above, the original definition of "employer" in the Act was limited to persons "engaged in an industry affecting commerce. . ." 29 U.S.C. 630(b).

In 1974, the Congress enacted P.L. 93-259, entitled the "Fair Labor Standards Amendments of 1974." The introductory statement of the 1974 amendments quotes from the original Fair Labor Standards Act of 1938:

> Congress hereby finds that the existence in industries engaged in *commerce* of labor conditions detrimental to the mainentance of minimum health, efficiency and general well being of workers: (1) causes *commerce* and the channels and instrumentalities of *commerce* to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens *commerce* and the free flow of goods in *commerce*; (3) constitutes an unfair method of competition in *commerce*; (4) leads to labor disputes burdening and obstructing *commerce* and the free flow of goods in *commerce*; and (5) interferes with the orderly and fair marketing of goods in *commerce*. (emphasis added).

House Report No. 93-913 (*U.S. Code Congressional and Administrative News*, 1974, pp. 2811-2812.) While this statement apparently refers to the amendments concerning the provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201, *et seq.*, there is no additional or alternate purpose preceding Section 28 of the amendments which were those relating to the ADEA.

In 1974, this Court's decision in *Marlyand v. Wirtz*, 392 U.S. 183 (1968), was controlling as to the power of Congress

under the Commerce Clause to interfere with sovereign state functions. The Congress, in enacting the 1974 amendments, specifically noted *Wirtz, supra*, as follows:

> The commerce power provides a constitutional basis for extension of the Act to state-operated schools and hospitals.

Id., p. 2817.

It was not until 1976 that this Court decided *National League of Cities, supra*, which overruled *Wirtz, supra*, and held the Fair Labor Standards Amendments of 1974, at least with respect to the minimum wage and overtime provisions of the amendments, unconstitutional as applied to the states. While Appellant took the position below that the extension of the ADEA to the states, was not related to the FLSA's extension to the states, even though contained in the same Act, the history of the 1974 amendments reflects that the "amendment [of ADEA] is a logical extension of the committee's decision to extend FLSA coverage to Federal, State and local government employers." *Id.*, 2849.

As Appellant notes in its Jurisdictional Statement, courts confronted with the question of whether ADEA is unconstitutional in its application to the states have held against that proposition. Jurisdictional Statement, p. 10. (It is no longer true that "every court that has addressed the issue" has reached that conclusion, however, See: *Taylor v. Department of Fish and Game of the State of Montana, et al.*, No. 80-7-M (D. Mont., October 6, 1981) Smith, J.; *EEOC v. Louisiana, et al.*, No. 80-0282 (E. D. La., October 30, 1981) Morey, J.) Those courts which have ruled that ADEA may withstand a challenge based upon *National League of Cities, supra*, have done so based upon a footnote to that decision which pointed out that its rationale should not be extended to federal statutes which were empowered by, for example, Section 5 of the Fourteenth Amendment. *National League of Cities, supra*, note 17.

This Court then decided *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), which held that the Tenth Amendment was no bar to application of Title VII of the Civil Rights Act, 42 U.S.C. 2000e, *et seq.*, to the states. Thereafter, the courts confronted with the issue were quick to compare the ADEA to Title VII and find that since the two statutes both dealt with discrimination, the extension of ADEA to the states could be *impliedly* ascribed to the power of Congress under Section 5 of the Fourteenth Amendment. (Eg. *Arritt v. Grissell*, 567 F.2d 1267 (4th Cir. 1977), finding that the rejection by Congress of Senator Javits' proposal to include age discrimination within Title VII was sufficient expression by Congress of an intent to pass the 1974 amendments pursuant to its Fourteenth Amendment power.)

Other decisions which have been cited as precedential have avoided *National League of Cities, supra*, by finding that the economic impact imposed by ADEA upon the states was not significant enough to trigger the Tenth Amendment. Eg. *Aaron v. Davis*, 424 F.Supp. 1238 (E.D. Ark. 1976). Such decisions ignore the holding of *National League of Cities, supra*, with respect to such analyses:

> We do not believe particularized assessments of actual impact are crucial to the resolution of the issue presented, however. * * * [T]he dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the states. . .This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution.

426 U.S. at 851.

It was not until *Pennhurst State School, supra*, that this Court stated its test for "determining when Congress intends to enforce [the] guarantees [of the Fourteenth Amendment]."

___ U.S. ___, 67 L.Ed.2d at 706. That test is, simply:

> Because such legislation imposes congressional policy on a state involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.

Id.

Katzenbach v. Morgan, 384 U.S. 641 (1966), and *Fitzpatrick v. Bitzer, supra*, the cases decided by this Court which are consistently relied upon by those courts reaching conclusions contrary to the decision below, do not hold otherwise.

Nowhere in the history of the ADEA or in that of the 1974 amendments is a *stated* intent to act pursuant to the Fourteenth Amendment. Only by implication and comparison does any court reach that conclusion. See, eg. *EEOC v. Calumet County*, 26 F.E.P.C. 20 (E.D. Wis. 1981).

II.

THE FOURTEENTH AMENDMENT CANNOT SUPPORT THE EXTENSION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT TO THE STATES.

Those courts which have decided that, contrary to congressional expression of its intent to utilize its commerce power, the ADEA's 1974 amendments are supported by Congress' Fourteenth Amendment power, have never analyzed the limitations upon that power.

Section 5 of the Fourteenth Amendment enables Congress to "enforce, by appropriate legislation," the provisions of the Amendment.

Those courts which have decided that ADEA is empowered by Section 5 have held that the provision which ADEA enforces is the Equal Protection Clause. Fourteenth Amendment, Section 1. Eg. *Arritt, supra; Aaron, supra; Usery v. Bd. of Education of Salt Lake City*, 421 F.Supp.718 (D. Utah 1976); Cf. *Usery v. Manchester East Catholic Reg. School Bd.*, 430 F.Supp. 188 (D.N.H. 1977).

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), Justice Black tracked the history of the Fourteenth Amendment and found three limitations upon Congress' power to enforce the guarantees of the Fourteenth Amendment, including that "Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.'" 400 U.S. at 128. Therefore, it is important to analyze the ADEA in this context to determine whether Congress has exceeded its authority, even if it were proper to imply a Fourteenth Amendment power for the ADEA.

1. The ADEA enforces no provision of the Fourteenth Amendment because classifications based upon age do not fall within the Equal Protection Clause. In *Oregon, supra*, expressing the views of five members of the Court[2], Justice Black found that Congress had not the power to reduce the voting age for state elections from 21 to 18. That is, Congress may not, pursuant to its power under Section 5 of the Fourteenth Amendment, dictate age standards which must be utilized by the states in their integral functions.

2. The ADEA is not "appropriate legislation" to "enforce" the Equal Protection Clause because by limiting the protected class to employees who are between the ages of 40 and 70 years, the ADEA restricts the guarantees of the Equal Protection Clause.

[2] Concurring with Justice Black as to this holding were Chief Justice Burger, Justices Harlan, Stewart, and Blackmun.

If the Court should find that classifications based upon age are within the guarantees of the Equal Protection Clause[3], the ADEA cannot be viewed as enforcing the provisions of the amendment in any event.

As stated in *Katzenbach v. Morgan*, 384 U.S. 641 (1966):

> We emphasize that Congress' power under Section 5 is limited to adopting measures to enforce the guarantees of the Amendment; Section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the states to establish racially segregated systems of education would not be — as required by Section 5 — a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws.

384 U.S. at note 10.

ADEA, in effect, authorizes the states to discriminate against employees who are younger than 40, or older than 70. To precisely the same extent that age may be viewed to be within the Equal Protection Clause, ADEA violates the clause by creating a classification based solely on age.

Therefore, ADEA cannot be a valid exercise of Congress' Section 5 power.

III.

THE 1974 CONGRESS DID NOT INTEND THAT THE AGE DISCRIMINATION IN

[3] While not deciding this specific question, the Court's decision in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), treated a direct challenge to mandatory retirement at age 50 under the traditional equal protection tests. Therefore, it might be implied that the Equal Protection Clause protects against age discrimination.

EMPLOYMENT ACT PREVENT THE MANDATORY RETIREMENT OF LAW ENFORCEMENT OFFICERS AT AGES LESS THAN 70.

Initially, it must be noted that Wyoming Game and Fish Wardens are law enforcement officers under state law. §§ 9-3-1901(a)(vii), W.S. 1977; § 7-2-101, W.S. 1977, as amended; and §23-6-101, W.S. 1977. (Appendix A.).

The 1974 amendments to ADEA, in addition to extending coverage to the states, extended coverage to the executive branch of the federal government. 29 U.S.C. 633a, P.L. 93-259, Section 28(b)(2), 88 Stat. 55. The same Congress, however, passed P.L. 93-350, 88 Stat. 355, which required law enforcement officers and firefighters at the federal level to "be separated from service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age." P.L. 93-350, Section 4. Extensions until age 60 were authorized to be made by the head of the agency. *Id.*

The existing law at the time of these amendments contained "[n]o provisions [requiring] compulsory retirement of employees in these positions until age 70," and the amendment required "mandatory retirement of otherwise eligible law enforcement officers and firefighters at age 55. . ." Senate Report No. 93-948 (*U.S. Code Congressional and Administrative News*, 1974, p. 3699.) The intent of the amendment is stated as:

> The history of retirement legislation dealing with law enforcement officers and firefighters shows congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age 50. This intent has been based on the nature of the work involved and the determination that these occupations should be

> composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands which are far more taxing physically than most in the Federal Service. They are occupations calling for the strength and stamina of the young rather than the middle aged. Older employees in these occupations should be encouraged to retire.

Id.

That is, on June 24, 1974, the Senate stated its intent that law enforcement officers[4] should not stay in service until age 70, but should face compulsory retirement at age 55. This statement was made less than two months after the effective date of P.L. 93-259, Section 28(b)(2).

It is, therefore, incongruous to believe that the 1974 Congress intended that Appellant bring this action on behalf of a Wyoming law enforcement officer.

CONCLUSION

Because the Tenth Amendment prohibits the Congress from exercising its Commerce Power to affect integral functions of state government, ADEA cannot be enforced against a state.

If Congress intended to use its powers under the Fourteenth Amendment to extend ADEA to the states, because ADEA does not "enforce" the Fourteenth Amendment, Congress acted in excess of its powers.

[4] Affected by this act were the FBI, the Bureau of Prisons, Immigration and Naturalization, Marshals, Bureau of Narcotics and Dangerous Drugs, Naval Intelligence, Postal Inspectors, the IRS, Customs, Secret Service, and Firefighters, totalling some 41,700 individuals. Other federal statutes treat certain services differently, as well. *Vance v. Bradley*, 440 U.S. 93 (1979).

In any event, Congress did not intend the provisions of ADEA to be enforced against the states on behalf of law enforcement officers.

For all the above reasons, Appellees respectfully submit that the decision of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A

§7-2-101, W.S. 1977, as amended, reads:

§7-3-101. Definition of "peace officer." As used in W.S. 7-2-101 through 7-2-103 "peace officer" means any duly authorized member of a sheriff's office, municipal police force, college or university campus police force, the Wyoming highway patrol, game and fish law enforcement personnel qualified pursuant to W.S. 9-3-1901 through 9-3-1906 and when enforcing Wyoming felony statutes following observation or discovery of the commission of a felony, during the performance of their statutory duties, or while responding to requests to assist other peace officers performing their official duties, and special agents of the state of Wyoming charged with the enforcement of criminal statutes and ordinances.

§9-3-1901(a)(vii), W.S. 1977, reads:

§9-3-1901. Definitions. (a) The terms in this act [§9-3-1901 to 9-3-1907], have the meanings herein specified:

(vii) "Peace officer" means any person who is serving on a full-time fully compensated basis as a duly authorized member of a sheriff's office, municipal police force, college or university campus police force, the Wyoming highway patrol, game wardens, or commissioned employees of the Wyoming game and fish commission, penitentiary guards, special agents and security personnel of the state of Wyoming or political subdivisions thereof charged with the enforcement of criminal statutes and ordinances, but does not include any person serving as such soley by virtue of his occupying any other office or position;

§23-6-101, W.S. 1977, reads:

§23-6-101. Arrest without warrant; when person arrested to be taken immediately before a court. Every game warden, commissioner, and other employee of the department

designated by the commission, and every Wyoming law-enforcement officer is authorized, empowered, and directed to arrest without warrant, any person found violating any provision of this act. When the offense charged is punishable as a misdemeanor, the arrested person shall be taken immediately before the nearest or most readily accessible court having jurisdiction of the offense in the county where the offense is alleged to have been committed unless the officer accepts the written promise to appear at a later time as hereinafter provided.

Appellant's Brief

Supreme Court, U.S.
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CLERK

No. 81-554

In the Supreme Court of the United States

OCTOBER TERM, 1981

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT

v.

WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTION PRESENTED

Whether Congress violated the Tenth Amendment when it amended Section 11(b) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 630(b), to include state and local government employers within the coverage of the Act.

PARTIES TO THE PROCEEDINGS BELOW

Additional defendants in the district court were:

Ed Herschler, individually and as Governor of the State of Wyoming and as ex officio member of the Wyoming Game and Fish Commission; the State of Wyoming Game and Fish Department; Earl M. Thomas, individually and as Director of the State of Wyoming Game and Fish Department; John Anselmi, individually and as President of the State of Wyoming Game and Fish Commission; J.W. "Wes" Myers, individually and as Vice President of the State of Wyoming Game and Fish Commission; Verne Barton, Jr., individually and as a member of the State of Wyoming Game and Fish Commission; Dave Wheeler, individually and as a member of the State of Wyoming Game and Fish Commission; Alice Hayes, individually and as a member of the State of Wyoming Game and Fish Commission; Fran Osborn, individually and as a member of the State of Wyoming Game and Fish Commission; Gene Bombi, individually and as a member of the State of Wyoming Game and Fish Commission; and the Wyoming Retirement System.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT

v.

WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINION BELOW

The opinion of the district court (J.S. App. 1a-13a) is reported at 514 F. Supp. 595.

JURISDICTION

The judgment of the district court (J.S. App. 14a-15a) was entered on May 22, 1981, and the notice of appeal (J.S. App. 16a-17a) was filed on June 19, 1981. The Court noted probable jurisdiction on January 11, 1982. The jurisdiction of this Court is in-

voked under 28 U.S.C. 1252. *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution, the Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 621 *et seq.*, and the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Wyo. Stat. § 31-3-101 *et seq.* (1977), are set forth at J.S. App. 18a-19a.

STATEMENT

1. The Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 621 *et seq.*, prohibits employers from discriminating on the basis of age against employees between the ages of 40 and 70 years by, *inter alia*, discharging them or requiring them to retire involuntarily. Sections 4(a)(1) and 12(a) of the Act, 29 U.S.C. (& Supp. III) 623 (a)(1) and 631(a). The Act initially applied only to private employers. Pub. L. No. 90-202, Section 11(b), 81 Stat. 605. In 1974, Congress extended the prohibitions against age discrimination to federal, state, and local government employers. Sections 11(b) and 15, 29 U.S.C. 630(b) and 633a.

The Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Wyo. Stat. § 31-3-101 *et seq.* (1977), permits the involuntary retirement of Wyoming Game and Fish Department employees as early as age 55 and imposes mandatory retirement at age 65 (Wyo. Stat. § 31-3-107(c) and (d) (1977)). J.S. App. 5a-6a.

Bill Crump was employed as a District Game Division supervisor by the Wyoming Game and Fish Department, but he was forced to retire at age 55. See J.S. App. 1a. Crump filed a charge of unlawful

age discrimination with the Equal Employment Opportunity Commission (Amended Compl. ¶ 9, at 3).[1] After unsuccessfully attempting to resolve the matter informally (Amended Compl. ¶ 10, at 3), the Commission filed this action in the United States District Court for the District of Wyoming, charging that the state's retirement policy violated the Age Discrimination in Employment Act. The Commission sought declaratory relief, as well as back pay and liquidated damages for persons adversely affected by the state retirement policy. *Id.* at 4-5. Appellees, the State of Wyoming and various individual state officials, moved to dismiss the complaint on the ground that, as applied to the states, the Act is unconstitutional. J.S. App. 22.

2. The district court dismissed the complaint on the ground that Congress violated the Tenth Amendment when it extended coverage of the Act to prohibit age discrimination by state and local governments (J.S. App. 1a-13a). The court stated that in 1974 Congress had relied only on its power under the Commerce Clause (Article I, Section 8, Clause 3), and not on the Fourteenth Amendment, in amending the Act (J.S. App. 10a-11a).[2] Citing this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the court observed that application

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[1] The Commission is the agency charged with enforcing the Act. See Section 2 of Reorg. Plan No. 1 of 1978, 92 Stat. 3781.

[2] In support of their motion to dismiss, appellees argued that the Act, "even if passed under the Fourteenth Amendment, cannot apply here where there is no impermissible violation of that amendment's equal protection provisions" (J.S. App. 2a). Because it concluded that Congress had relied only upon the Commerce Clause in extending the Act to state and local governments, the district court did not address this issue.

of the Act in this case would "affect" state operations in an area of traditional services (J.S. App. 12a). The district court rejected the argument that the state interest in managing personnel matters was outweighed by the national interest in prohibiting age discrimination in employment, noting Congress' "inconsistency" in permitting the involuntary retirement of certain federal law enforcement employees before age 70, while denying the states the power to adopt the same policy (J.S. App. 12a-13a).

SUMMARY OF ARGUMENT

The district court held that Congress violated the Tenth Amendment in 1974 by extending the protection of the Age Discrimination in Employment Act of 1967 to persons employed by state and local governments. Congress' action in extending to state employees the protection of federal legislation prohibiting arbitrary age discrimination is a valid exercise of Congress' power to regulate commerce and its power to adopt legislation appropriate to enforce the Fourteenth Amendment.

1. The Age Discrimination in Employment Act is a valid exercise of the commerce power. The Act simply prohibits arbitrary treatment of persons because of their ages. We may assume that the Wyoming Game and Fish Department operates in an area of traditional government functions, as that phrase is used in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Nonetheless, the Act is valid. The power of state government to discriminate arbitrarily in employment on the basis of age is not a legitimate attribute of sovereignty, comparable to the power of a state to make fundamental employment decisions concerning minimum wages and hours.

There is no basis for assuming that the state's ability to structure its operations or to provide services will be affected in the slightest by compliance with the Age Discrimination in Employment Act. Absent any evidence that the Act impairs functions essential to the separate and independent existence of the states, it does not conflict with the Tenth Amendment. *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852. Congress carefully considered the potential costs to employers of generally prohibiting mandatory retirement before age 70; moreover, the Act includes safeguards sufficient to protect the legitimate financial interests of employers.

The federal interest in protecting individuals from arbitrary discrimination reflects substantial concerns pertinent to the commerce power and clearly outweighs the state's minimal interest in being free to discriminate arbitrarily, even with respect to employees hired to carry out traditional governmental functions. See *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852-853; *id.* at 856 (Blackmun, J., concurring).

2. The Age Discrimination in Employment Act is appropriate legislation to enforce the guarantee of equal protection of the laws. Section 5 of the Fourteenth Amendment permits Congress, for purposes of implementing the constitutional guarantee of equal protection of the laws, to intrude "into * * * spheres of autonomy previously reserved to the States," *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976); congressional power under Section 5 is not restricted by the Tenth Amendment. *City of Rome* v. *United States*, 446 U.S. 156, 159 (1980). Congress concluded after extensive study that arbitrary age discrimination in employment, like discrimination on account of

race, color, national origin, sex and religion, was a serious national problem requiring a legislative remedy. Congress' power under Section 5 is broader than the judicial enforcement power under Section 1 of the Fourteenth Amendment. Legislation reasonably regarded as necessary and proper to assure and give meaning and substance to the rights established in Section 1 is "appropriate" within the meaning of Section 5. The question of what remedial action is necessary to guarantee equal protection has repeatedly been recognized by this Court as a matter primarily for Congress' determination. See *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966); *City of Rome* v. *United States*, 446 U.S. 156, 176-178 (1980); *Fullilove* v. *Klutznick*, 448 U.S. 448, 483-484 (1980).

ARGUMENT

APPLICATION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT TO STATE AND LOCAL GOVERNMENT EMPLOYERS IS AN EXERCISE OF POWERS EXPRESSLY DELEGATED TO CONGRESS AND IS FULLY CONSISTENT WITH THE TENTH AMENDMENT

A. The Act is a Valid Exercise of Congress' Commerce Power and does not Contravene the Tenth Amendment

The "Commerce Clause is a grant of plenary authority to Congress." *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, No. 79-1538 (June 15, 1981), slip op. 9-10. As this Court recently reaffirmed, Congress' power to regulate commerce is " 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.' " *Id.* at 10, quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196

(1824). Neither appellees nor the district court disputes Congress' finding that "the existence * * * of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce" (Section 2(a)(4), 29 U.S.C. 621(a)(4)). Nor is there any question as to the reasonableness of the means Congress selected for addressing the problem. Rather, the district court held that enforcement of the Act against the state game and fish department, though plainly within the scope of the Commerce Clause, would violate the Tenth Amendment.

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." See generally *United States* v. *Darby*, 312 U.S. 100, 124 (1941). In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court held that the 1974 amendments to the Fair Labor Standards Act, which "extended the minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions" (426 U.S. at 836), violated the Tenth Amendment because they "directly supplant[ed] the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment" (*id.* at 848).

In *National League of Cities*, the Court observed that the amendments sought "to regulate directly the activities of States as public employers" (426 U.S. at 841) and spoke "directly to the States *qua* States" (*id.* at 847). Finding that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom

they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime" (*id.* at 845), the Court concluded that "the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions * * *" (*id.* at 852) and, moreover, "would impair the States' 'ability to function effectively in a federal system' " (*ibid.*, quoting *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975)) and intrude upon state " 'functions essential to separate and independent existence' " (426 U.S. at 845, quoting *Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911), and *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868)).

The limitation on Congress' express power to regulate commerce that this Court found implicit in the Tenth Amendment is quite narrow. In *Fry* v. *United States*, 421 U.S. 542 (1975), the Court rejected a Tenth Amendment challenge to the Economic Stabilization Act of 1970, commerce clause legislation authorizing the President to regulate wage and salary increases for state and local government employees. The continuing vitality of *Fry* was specifically reaffirmed in *National League of Cities*. 426 U.S. at 852-853. It is apparent, therefore, that the Tenth Amendment does not preclude all commerce clause legislation affecting a state's power to deal with employees hired to carry out "traditional" or "integral" governmental functions. See also *United Transportation Union* v. *Long Island R.R.*, No. 80-1925 (Mar. 24, 1982), slip op. 8, 9-12. Indeed, Justice Blackmun joined the opinion of the Court in *National League of Cities* only "[w]ith the understanding"

(426 U.S. at 856) that it adopted "a balancing approach" (*ibid.*).

As explained in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, *supra*, slip op. 19-21, there are at least three prerequisites to establishing a Tenth Amendment violation of the sort found in *National League of Cities* (*id.* at 21; emphasis in original):

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* [426 U.S. 833] must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." *Id.*, at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.*, at 852.[3]

We recognize that the Age Discrimination in Employment Act, as applied to the Wyoming Game and Fish Department, regulates governmental and not private activity, and that wildlife management can be said to be a traditional government function. However, none of the other legal or factual prerequisites is established here.

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[3] In *United Transportation Union* v. *Long Island R.R.*, *supra*, the Court applied the "three-prong test" set out in *Hodel*, and rejected a claim that application of the Railway Labor Act (45 U.S.C. 151 *et seq.*) to a state-owned railroad violated the Tenth Amendment.

First, arbitrary discrimination is not an attribute of state sovereignty. See *Marshall* v. *A & M Consolidated Independent School District*, 605 F.2d 186, 188 (5th Cir. 1979) (Wisdom, J.); *Pearce* v. *Wichita County*, 590 F.2d 128, 132 (5th Cir. 1979); *Marshall* v. *City of Sheboygan*, 577 F.2d 1, 6 (7th Cir. 1978); *EEOC* v. *County of Calumet*, 519 F. Supp. 195, 202 (E.D. Wis. 1981), appeal pending, No. 81-2120 (7th Cir., argued Jan. 1, 1982); *Marshall* v. *Delaware River and Bay Authority*, 471 F. Supp. 886 (D. Del. 1979); *EEOC* v. *Florissant Valley Fire Protection District*, 21 Fair Empl. Prac. Cas. 973, 975, 21 Empl. Prac. Dec. ¶ 30,520, at 13,805 (E.D. Mo. 1979); *Usery* v. *Board of Education*, 421 F. Supp. 718, 719-720 (D. Utah 1976). The Age Discrimination in Employment Act does not interfere with the state's power to prescribe reasonable qualifications for those individuals to be employed to carry out state functions (Section 4(f)(1), 29 U.S.C. 623(f)(1)) or to discharge those individuals found unfit for state employment (Section 4(f)(3), 29 U.S.C. (Supp. III) 623(f)(3)). Nor does the Act interfere with the state's legitimate interest in retiring employees who are too old to perform adequately. Section 4(f)(1) of the Act specifically provides that "[i]t shall not be unlawful for an employer * * * to take any action otherwise prohibited * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business * * *" (29 U.S.C. 623(f)(1)).[4] The Act simply establishes

[4] With respect to the bona fide occupational qualification standard, the Senate Committee on Human Resources explained, S. Rep. No. 95-493, 95th Cong., 1st Sess. 10-11 (1977), *reprinted in* U.S. Equal Employment Opportunity Commission, *Legislative History of the Age Discrimination in Employment Act* 443-444 (1981) ("*Legis. Hist. ADEA*"):

the right of state government employees between the ages of 40 and 70 to be free from arbitrary or invidious discrimination.

In cases involving the Equal Pay Act of 1963, 29 U.S.C. 206(d), the courts have consistently rejected state claims that the power to discriminate arbitrarily on the basis of sex is an attribute of state sovereignty. *E.g.*, *Marshall* v. *A & M Consolidated Inde-*

> The committee intends to make clear that under this legislation an employer would not be required to retain anyone who is not qualified to perform a particular job. For example, in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.

See also 123 Cong. Rec. 34296 (remarks of Sen. Williams), 34319 (1977) (remarks of Sen. Javits), *Legis. Hist. ADEA* 483, 506; 113 Cong. Rec. 34747 (1967) (remarks of Rep. Dent), *Legis. Hist. ADEA* 158. See generally *Stewart* v. *Smith*, No. 80-1340 (D.C. Cir. Mar. 9, 1982), slip op. 12 n.26.

Wyoming has not asserted that the mandatory retirement provision at issue in this case is a bona fide occupational qualification within the meaning of Section 4(f)(1). Indeed, that the state retirement statute specifically contemplates that individual fish and game employees may be permitted to continue working on a year-to-year basis until age 65 is some indication that the age 55 standard is not a bona fide occupational qualification. See generally *Johnson* v. *Mayor of Baltimore*, 515 F. Supp. 1287, 1296-1301 (D. Md. 1981), cert. denied, No. 81-1112 (Feb. 22, 1982).

pendent School District, 605 F.2d 186, 188 (5th Cir. 1979); *Pearce* v. *Wichita County*, 590 F.2d 128, 131-132 (5th Cir. 1979); *Marshall* v. *City of Sheboygan*, 577 F.2d 1, 6 (7th Cir. 1978). The rationale of these cases holding the Equal Pay Act to be a constitutional exercise of the commerce power is equally applicable to the Age Discrimination in Employment Act. Both statutes simply prohibit state and local government employers from arbitrarily discriminating against their employees. Compare *Marshall* v. *Kent State University*, 589 F.2d 255 (6th Cir. 1978) (holding the Equal Pay Act constitutional, as applied to state employer, under Section 5 of the Fourteenth Amendment); *Marshall* v. *Owensboro-Daviess County Hospital*, 581 F.2d 116, 118-120 (6th Cir. 1978) (same); *Usery* v. *Charleston County School District*, 558 F.2d 1169, 1170-1171 (4th Cir. 1977) (same); *Usery* v. *Allegheny County Institution District*, 544 F.2d 148, 154-156 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977) (same).

Second, there is nothing in the record of this case that suggests that compliance with the modest requirements of the Age Discrimination in Employment Act will "directly impair" Wyoming's ability "to structure integral operations in areas of traditional governmental functions." The budgetary considerations noted in *National League of Cities*, where federal minimum wage requirements could have forced the restructuring of entire state government departments and required the elimination of entire functions (426 U.S. at 846-852), are absent in this case. Wyoming has not argued that application of the Age Discrimination in Employment Act will have any such adverse budgetary impact upon the

states, and both the design of the Act and pertinent congressional findings indicate that it will not.[5] If

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[5] In the district court, Wyoming merely argued that Congress had intruded into an area that was traditionally the domain of the states. See Br. in Support of Mot. to Dismiss at 8. In view of the State's failure to make any showing of adverse economic impact, and the fact that the Act does not require the retention of any employee who is unable to perform his or her job, or prohibit nondiscriminatory reductions in force, there is no basis whatsoever for the district court's assertion that "the State could be saddled with greater economic responsibilities in keeping its law enforcement personnel on its payrolls an additional 10 years" (J.S. App. 12a).

Moreover, Section 4(f)(2) of the Act (29 U.S.C. (Supp. III) 623(f)(2)), which provides that an employer may observe the terms of "bona fide employee benefit plan[s] such as * * * retirement, pension, or insurance plan[s] * * *," was specifically intended to eliminate the only significant adverse financial consequence for employers that could result from the Act's proscription of arbitrary age discrimination. See generally *Alford* v. *City of Lubbock*, 664 F.2d 1263, 1269-1270 (5th Cir. 1982); 44 Fed. Reg. 30648-30649 (1979). As Senator Javits explained in 1967 (113 Cong. Rec. 31255 (1967), *Legis. Hist. ADEA* 146):

> The meaning of this provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers.

See *ibid.* (remarks of Sen. Yarborough); 113 Cong. Rec. 34727 (1967) (remarks of Rep. Daniels); H.R. Rep. No. 805, 90th Cong., 1st Sess. 4 (1967), *Legis. Hist. ADEA* 77; S. Rep. No. 723, 90th Cong., 1st Sess. 4 (1967), *Legis. Hist. ADEA* 108; H.R. Rep. No. 95-527 (Pt. 1), 95th Cong., 1st Sess. 26-27 (1977), *Legis. Hist. ADEA* 386-387; S. Rep. No. 95-493, 95th Cong., 1st Sess. 9-10 (1977), *Legis. Hist. ADEA* 442-443; 123 Cong. Rec. 34295 (1977) (remarks of Sen. Williams), *Legis. Hist. ADEA* 482; 124 Cong. Rec. 8218-8219 (1978) (remarks of Sen. Javits), *Legis. Hist. ADEA* 539-540; see also *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Sen-*

age is a "bona fide occupational qualification," a state employer is free to impose a mandatory retirement age; merely requiring a state to consider the facts relevant to such a decision plainly does not impair the state's ability "to structure integral operations in areas of traditional governmental functions" in any sense comparable to the impairment this Court concluded would follow from the financial consequences of enforcing the statute at issue in *National League of Cities*. See, *e.g.*, *EEOC* v. *Elrod*, No. 80-2810 (7th Cir. Mar. 16, 1982), slip op. 18-20; compare *United Transportation Union* v. *Long Island R.R.*, *supra*, slip op. 8, 9-12.

Thus, the effect upon the states of the Age Discrimination in Employment Act's prohibition of arbitrary age-based discrimination is significantly more limited than the effect of the statute at issue in *National League of Cities*. There is no interference here with the states' ability to determine the wages, hours, qualifications, number, or functions of state employees; nor does the Act impair any other legiti-

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ate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 27-30, 53, 106-107 (1967).

More specifically, in extending the protections of the Act to employees older than 65, Congress carefully considered the potential economic consequences and concluded that employers would not be subjected to significant additional costs:

> The argument that pension and other employee benefit plan costs would increase if the act's upper age limit is increased has not been substantiated.

S. Rep. No. 95-493, *supra*, at 5, *Legis. Hist. ADEA* 438; see *id.* at 14-16, *Legis. Hist. ADEA* 447-449. See also 123 Cong. Rec. 34295 (remarks of Sen. Williams), 34297 (1977) (remarks of Sen. Javits), *Legis. Hist. ADEA* 482, 484; 124 Cong. Rec. 7881 (remarks of Rep. Hawkins), 8218-8219 (1978) (remarks of Sen. Javits).

mate power necessary to the separate and independent existence of the states.

Finally, under *National League of Cities*, even direct regulation of the states concerning matters that are attributes of sovereignty and impairing the states' ability to structure integral operations in areas of traditional state functions is permissible if the federal interest outweighs the state interest. As *Hodel* makes clear:

> Demonstrating that [the] three requirements [of *National League of Cities*] are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies State submission.

Slip op. 21 n.29 (citations omitted); see *United Transportation Union* v. *Long Island R.R.*, *supra*, slip op. 5-6 n.9. Here, the state's interest is nothing more than the assertion of a prerogative to discriminate against its employees arbitrarily on the basis of age—an interest no more substantial than the state would have in a prerogative to discriminate arbitrarily on the basis of race, color, sex, religion, or national origin. Such an interest, if it is legitimate at all, is surely minimal where, as here, federal law does not interfere with the state's prescription of reasonable job qualifications or of its employees' functions, compensation, and other terms and conditions of employment.

By contrast to the minimal interest asserted by the state, both the original Act and its extension to government employees reflect substantial congressional concerns pertinent to the great purposes of the commerce power. The Act had its genesis in Section 715 of the Civil Rig[illegible] Act of 1964, Pub. L.

No. 88-352, 78 Stat. 265, which directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected" and to report to Congress the results of that study and such legislative recommendations as he determines advisable.[6] That report, entitled *The Older American Worker: Age Discrimination in Employment*, was submitted to Congress on June 30, 1965 (*Legis. Hist. ADEA* 16-41). Among its findings were the following (*The Older American Worker, supra*, at 18, *Legis. Hist. ADEA* 35):

> The consequences of discrimination embrace a wide range of production loss, human hardship, and frustrations. This may well include the loss of important innovations in the fields of science and technology.
>
> * * * * *
>
> It is a fair estimate that a million man-years of productive time are unused each year because of unemployment of workers over 45; and vastly greater numbers of years are lost because of forced, compulsory, or automatic retirement.
>
> * * * * *
>
> A substantial portion of the unemployment insurance payments of $1 billion a year to workers 45 and over can be attributed to unemployment resulting in one way or another from the fact of the employee's age. Some of these payments, of course, would go to workers who are between jobs even under conditions of full employment; nonetheless, a large but incalculable proportion involves long-duration unemployment

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[6] See note 16, *infra*. A more detailed recounting of the Act's origins is set forth in *EEOC* v. *Elrod*, *supra*, slip op. 7 n.3.

that reflects the difficulty which the older worker faces in attempting to find a new job. The Nation loses, furthermore, potential production in an amount at least two or three times the size of the unemployment insurance payments that might be attributable to discrimination.

* * * * *

Only a hypothetical calculation can be made of the potential contributions of those who have retired involuntarily. Such a calculation would easily yield several billion dollars a year on the assumption that the participation rate for males 65 and over (in either paid or voluntary activity) might rise to a point about halfway between the present labor force participation rate (28 percent) and the 1948 rate of 47 percent (less than half the participation rate for lower ages), and that earnings would not on the average exceed the amounts possible without reduction of OASDI benefits. The fact that about one-third of the men retiring under OASDI regarded their retirement as involuntary—as previously indicated—suggests that these assumptions may not be unreasonable. Moreover, the results of this calculation are similar to those of the late Professor Sumner Slichter who in 1952 estimated $3.8 billion in 1951 prices as a conservative measure of "present loss of production from retired workers."

When the ADEA was enacted two years later, the Secretary's report was discussed in both the House and Senate reports. H.R. Rep. No. 805, *supra*, at 1-2, *Legis. Hist. ADEA* 74-75; S. Rep. No. 723, *supra*, at 1-2, *Legis. Hist. ADEA* 105-106. Those reports further quoted the President's message recommending the legislation as follows:

"Hundreds of thousands, not yet old, not yet voluntarily retired, find themselves jobless be-

> cause of arbitrary age discrimination. Despite our present low rate of unemployment, there has been a persistent average of 850,000 people age 45 and over who are unemployed. Today more than three-quarters of the billion dollars in unemployment insurance is paid each year to workers who are 45 and over. They comprise 27 percent of all the unemployed, and 40 percent of the long-term unemployed." [7]

It was against this background that Congress found and declared that "the existence * * * of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce" (Section 2(a)(4), 29 U.S.C. 621(a)(4)).

From this perspective, the 1974 extension of the Act to cover federal, state, and local employees is properly viewed as reflecting congressional recognition that the private sector cannot carry the entire responsibility for providing older workers in the nation's economy with productive employment opportunities. In introducing the bill to extend the Act, Senator Bentsen pointed out (118 Cong. Rec. 7745 (1972)) that "Government is the Nation's largest employer with over 10 million employees in State and local government and millions more at the Federal level" and that "Government has the greatest growth rate of any * * * sector of our society * * *." See also *EEOC* v. *Elrod*, *supra*, slip op. 19-20.

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[7] See 113 Cong. Rec. 34741 (1967) (remarks of Rep. Perkins), *Legis. Hist. ADEA* 152; 113 Cong. Rec. 34744 (1967) (remarks of Rep. Hawkins), *Legis. Hist. ADEA* 155; 113 Cong. Rec. 34745 (1967) (remarks of Rep. Eilberg), *Legis. Hist. ADEA* 156; 113 Cong. Rec. 34746 (1967) (remarks of Rep. Dent), *Legis. Hist. ADEA* 157; 113 Cong. Rec. 34749 (1967) (remarks of Rep. Randall), *Legis. Hist. ADEA* 160; 113 Cong. Rec. 34752 (1967) (remarks of Rep. Dwyer), *Legis. Hist. ADEA* 163.

In sum, the federal interest (1) in protecting citizens of the United States and noncitizens employed by the states from arbitrary discrimination at the hands of the states,[8] (2) in preventing unnecessary demands on the social security system and other income maintenance programs,[9] and (3) in eliminating an unnecessary burden on the free flow of commerce is more than sufficient in the face of a Wyoming's bald assertion of a prerogative to be arbitrary. See *EEOC* v. *Elrod*, *supra*, slip op. 18-21; *Aaron* v. *Davis*, 424 F. Supp. 1238, 1241 (E.D. Ark. 1976); *Usery* v. *Board of Education*, *supra*, 421 F. Supp. at 720; see generally Staff of Select Comm. on Aging, 95th Cong., 1st Sess., *Report on Mandatory Retirement: The Social and Human Cost of Enforced Idleness* 32-37 (Comm. Print 1977), *Legis. Hist. ADEA* 341-346.[10]

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[8] See note 13, *infra*; Staff of Select Comm. on Aging, 95th Cong., 1st Sess., *Report on Mandatory Retirement: The Social and Human Cost on Enforced Idleness* 22-23 (Comm. Print 1977), *Legis. Hist. ADEA* 331-332.

[9] See, *e.g.*, Staff of Select Comm. on Aging, 95th Cong., 1st sess., *Report on Mandatory Retirement: The Social and Human Cost of Enforced Idleness* 46-47 (Comm. Print 1977) (views of Rep. Biaggi), *Legis. Hist. ADEA* 355-356; 123 Cong. Rec. 29015 (1977) (remarks of Rep. Zeferetti), *Legis. Hist. ADEA* 412; 123 Cong. Rec. 30567 (1977) (remarks of Rep. McKinney), *Legis. Hist. ADEA* 426; 123 Cong. Rec. 30571 (1977) (Remarks of Rep. Rooney), *Legis. Hist. ADEA* 430; 123 Cong. Rec. 30572 (1977) (remarks of Rep. Leggett), *Legis. Hist. ADEA* 438; 123 Cong. Rec. 34294 (1977) (remarks of Sen. Williams), *Legis. Hist. ADEA* 481; S. Rep. No. 95-493, *supra*, at 4, *Legis. Hist. ADEA* 437.

[10] Under the Act, there is no mandatory retirement age for most federal employees. The district court deemed it significant, however, that Congress preserved mandatory retirement provisions for certain federal law enforcement personnel (see

Wyoming cannot show that the Age Discrimination in Employment Act addresses a matter that is "indisputably" an attribute of sovereignty or that

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5 U.S.C. (Supp. IV) 8335). That exemption was the product of an agreement to provide the committees with jurisdiction over the retirement programs at issue the opportunity to review the mandatory retirement provisions. See *Vance* v. *Bradley*, 440 U.S. 93, 97 n.12 (1979).

During consideration of the 1978 amendments to the Act in the House, Representative Spellman offered an amendment on behalf of the House Post Office and Civil Service Committee (123 Cong. Rec. 30556 (1977), *Legis. Hist. ADEA* 415):

> to continue in effect those mandatory retirement provisions which are applicable to specific civil service occupations such as air traffic controller, law enforcement officer and firefighter.
>
> Also, this amendment will leave intact the existing retirement provisions applicable to Foreign Service personnal [*sic*] and employees of the Central Intelligence Agency.
>
> * * * * *
>
> I hasten to point out that this amendment does not indicate opposition perse [*sic*] to elimination of mandatory retirement for air traffic controllers, firefighters, and other specific occupations.
>
> However, since most of these mandatory retirement provisions are part of liberalized retirement programs, our committee believes that such provisions should not be repealed until the individual retirement programs have been reexamined.

As Representative Hawkins stated in agreeing to the amendment (*ibid.*):

> By this action we are reaffirming the mandatory retirement ages in the statutes applicable to these positions. The sole purpose of this agreement is to afford the committees the opportunity to review these statutes.

Consequently, Congress' failure to eliminate mandatory retirement provisions affecting federal law enforcement personnel provides no basis for discounting the significance of the federal interest in prohibiting arbitrary age discrimination.

compliance with the Act would directly impair its ability "to structure integral operations in areas of traditional governmental functions" (*National League of Cities*, *supra*, 426 U.S. at 850); therefore, its Tenth Amendment claim must fail. Even if the prerequisites for establishing a Tenth Amendment claim had been satisfied in this case, the federal interests at stake far outweigh Wyoming's minimal interests in arbitrarily discriminating against its employees on the basis of age.

B. As Applied to State and Local Government Employers, the Age Discrimination in Employment Act is Appropriate Legislation to Enforce the Fourteenth Amendment

Congressional power to legislate to enforce Section 1 of the Fourteenth Amendment is not limited by the Tenth Amendment. See *Hodel* v. *Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981), slip op. 20-21 n.28; *City of Rome* v. *United States*, 446 U.S. 156, 179 (1980); *Ex parte Virginia*, 100 U.S. 339, 346 (1879); *EEOC* v. *Elrod*, No. 80-2810 (7th Cir. Mar. 16, 1982), slip op. 14-15. *Blake* v. *City of Los Angeles*, 595 F.2d 1367, 1373-1374 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); *United States* v. *City of Chicago*, 573 F.2d 416, 422-424 (7th Cir. 1978); *Usery* v. *Allegheny County Institution District*, 544 F.2d 148, 154-156 (3d Cir. 1976). See also *Milliken* v. *Bradley*, 433 U.S. 267, 291 (1977); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976); *National League of Cities* v. *Usery*, 426 U.S. 833, 852 n.17 (1976). Having concluded that the Age Discrimination in Employment Act was in some sense (J.S. App. 11a; emphasis added) "passed *only* under the Commerce Power of Congress," the district court ignored the Equal Em-

ployment Opportunity Commission's argument that, as applied to the state, the Act was appropriate legislation to enforce the Fourteenth Amendment and therefore valid under Section 5 of that Amendment.

Contrary to the district court's apparent assumption (see J.S. App. 11a), "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Miller Co.*, 333 U.S. 138, 144 (1948); see *Katzenbach* v. *Morgan*, 384 U.S. 641, 646-647 n.5, 652-656 (1966); *Keller* v. *United States*, 213 U.S. 138, 147 (1909); see generally *Griffin* v. *Breckenridge*, 403 U.S. 88, 104-107 (1971). Nothing in Article I of the Constitution requires Congress to generate legislative history, or to specify in any way the constitutional basis for its action, in order to enact valid legislation. And surely the meaning of the Constitution does not change depending on whether Congress specifies the "correct" basis for its action; the question of constitutionality is one of power to act, not theory. See, *e.g.*, *Marshall* v. *Owensboro-Daviess County Hospital*, *supra*, 581 F.2d at 120; *Usery* v. *Charleston County School District*, *supra*, 558 F.2d at 1171; *Usery* v. *Allegheny County Institution District*, *supra*, 544 F.2d at 155.[11]

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[11] *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1 (1981) is not to the contrary. The Court there held that Section 111 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (42 U.S.C. (& Supp. III) 6010) created no substantive rights enforceable by the mentally retarded. In rejecting the contention that the Act was adopted pursuant to Section 5 of the Fourteenth Amendment rather than the spending power and was therefore applicable to all states, whether or not they received financial assistance

Moreover, although the legislative history of the Age Discrimination in Employment Act is not extensive, what evidence there is supports the conclusion that Congress understood that the 1974 extension of the Act to state and local government employers was supported by both the Commerce Clause and Section 5 of the Fourteenth Amendment. See *Arritt* v. *Grisell*, 567 F.2d 1267, 1270-1271 & n.11 (4th Cir. 1977); see generally *EEOC* v. *County of Calumet*, 519 F. Supp. 195, 198-200 (E.D. Wis. 1981). Congress first considered extending the Age Discrimination in Employment Act to cover state and local government employers in 1972, when it amended Title VII of the Civil Rights Act of 1964 to cover state and local government employers (Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, Section 2(f), 86 Stat. 103, 42 U.S.C. 2000e(f)). See 118 Cong. Rec. 7745-7746 (1972) (remarks of Sen. Bentsen), *reprinted in* U.S. Equal Employment Opportunity Commission, *Legislative History of the Age Discrimination in Employment Act* 205-206 (1981); S. Rep. No. 92-842, 92d Cong., 2d Sess.

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under the Act, the Court noted that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment" because "such legislation imposes congressional policy on a State involuntarily and because it often intrudes on traditional state authority" (451 U.S. at 16). See *id.* at 35 (White, J., dissenting in part). This principle is a guide to statutory construction, but it has no application in a case such as this where Congress' intention to impose its policy on the states is clear. *EEOC* v. *Elrod*, *supra*, slip op. 13-14 n.8. In such circumstances, Congress must be presumed to have acted pursuant to whatever authority it had to act. Compare *Railway Labor Executives' Association* v. *Gibbons*, No. 80-415 (Mar. 2, 1982), slip op. 10-11.

45-46 (1972), *Legis. Hist. ADEA* 210-211. The amendments to Title VII, of course, were expressly based on both the Commerce Clause and Section 5 of the Fourteenth Amendment. See, *e.g.*, S. Rep. No. 92-415, 92d Cong., 1st Sess. 10-11 (1971), *reprinted in* Staff of Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972* 419-420 (Comm. Print 1972) ("*Legis. Hist. Title VII*"); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 19 (1971), *Legis. Hist. Title VII* 79; 118 Cong. Rec. 1839-1840 (1972), *Legis. Hist. Title VII* 1173-1174 (remarks of Sen. Javits); 118 Cong. Rec. 1815-1816 (1972), *Legis. Hist. Title VII* 1113-1115 (remarks of Sen. Williams). The members of the 92d Congress were therefore quite conscious of the breadth of their power to regulate state and local government pursuant to Section 5 of the Fourteenth Amendment. Further, in introducing the legislation that was ultimately enacted to extend coverage of the Age Discrimination in Employment Act to state and local government employees, Senator Bentsen specifically directed the attention of his colleagues to the recent amendments to Title VII, stating (118 Cong. Rec. 15895 (1972), *Legis. Hist. ADEA* 208): "I believe that the principles underlying these provisions in the EEOC bill are directly applicable to the Age Discrimination in Employment Act." [12]

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[12] Senator Bentsen's proposal was included in the Fair Labor Standards Amendment of 1972 as reported by the Senate Committee on Labor and Public Welfare (S. Rep. No. 92-842, 92d Cong., 2d Sess. 45-46, 93-94 (1972), reprinted in part, *Legis. Hist. ADEA* 210-211), but Congress adjourned before the legislation was enacted. See S. Rep. No. 93-147, 93d Cong., 1st Sess. 103-104 (1972). An identical provision

Moreover, it is plain that Congress regarded arbitrary discrimination based on age as "invidious" and comparable to discrimination based on race, sex, religion, or national origin. In approving the extension of the Age Discrimination in Employment Act to cover state and local government employers, both the House and Senate Committees quoted with approval the following passage from the President's statement recommending the legislation:

> "Discrimination based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the Nation the contribution they could make if they were working."

S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974), *Legis. Hist. ADEA* 251; H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 40 (1974), *Legis. Hist. ADEA* 254. The frequent comparisons in the legislative history of the Act between discrimination based on age and discrimination based on race, sex, religion, and na-

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was approved by the Senate Committee on Labor and Public Welfare in 1973 (S. Rep. No. 93-300, 93d Cong., 1st Sess. 56-57, 107-108 (1973) (reprinted in part, *Legis. Hist. ADEA* 246-247) and was enacted without change in 1974, S. Rep. No. 93-690, 93d Cong., 2d Sess. 55-56 (1974), *Legis. Hist. ADEA* 251-252; H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 16, 40-41 (1974), reprinted in part, *Legis. Hist. ADEA* 254-255; Pub. L. No. 93-259, Section 28(a), 88 Stat. 74; see generally S. Rep. No. 93- 846, 93d Cong., 2d Sess. 112-113 (1974).

tional origin tend to confirm this view.[13] Given this perception of the nature of the prohibitions of the Age Discrimination in Employment Act, it is likely that Congress believed, as we do, that the 1974 amendments to the Act were quite plainly supported by Section 5 of the Fourteenth Amendment. See also H.R. Rep. No. 92-238, *supra*, at 19, *Legis. Hist. Title VII* 79 (emphasis added): "The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution,

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[13] See, *e.g.*, 110 Cong. Rec. 2597 (1964) (remarks of Rep. Pucinski), *Legis. Hist. ADEA* 6; 113 Cong. Rec. 31256-31257 (1967) (remarks of Sen. Young), *Legis. Hist. ADEA* 147-148; 113 Cong. Rec. 34742 (1967) (remarks of Rep. Burke), *Legis. Hist. ADEA* 153; 113 Cong. Rec. 34744 (1967) (remarks of Rep. Kelly), *Legis. Hist. ADEA* 155; 113 Cong. Rec. 34746 (1967) (remarks of Rep. Olsen), *Legis. Hist. ADEA* 157; 118 Cong. Rec. 15895 (1972) (remarks of Sen. Bentsen), *Legis. Hist. ADEA* 208; 123 Cong. Rec. 29004-29005 (1977) (remarks of Rep. Findley), *Legis. Hist. ADEA* 401-402; 123 Cong. Rec. 29009 (1977) (remarks of Rep. Pepper), *Legis. Hist. ADEA* 406; 123 Cong. Rec. 29011 (1977) (remarks of Rep. Cohen), *Legis. Hist. ADEA* 408; 123 Cong. Rec. 29014 (1977) (remarks of Rep. Waxman), *Legis. Hist. ADEA* 411; 123 Cong. Rec. 30557 (1977) (remarks of Rep. Hillis), *Legis. Hist. ADEA* 416; 123 Cong. Rec. 30563 (1977) (remarks of Rep. Pepper), *Legis. Hist. ADEA* 422; 123 Cong. Rec. 30566 (1977) (remarks of Rep. McKinney), *Legis. Hist. ADEA* 425; S. Rep. No. 95-493, 95th Cong., 1st Sess. 3 (1977), *Legis. Hist. ADEA* 436; S. Rep. No. 95-493, *supra*, at 34, *Legis. Hist. ADEA* 467 (additional views); see also Staff of Select Comm. on Aging, 95th Cong., 1st Sess., *Report on Mandatory Retirement: The Social and Human Cost of Enforced Idleness* vii. 38 (Comm. Print 1977), *Legis. Hist. ADEA* 309, 347. See also note 16, *infra*.

embodied in the Thirteenth and Fourteenth Amendments, is to prohibit *all forms of discrimination.*" Compare *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 659-660 (1974) (Rehnquist, J., dissenting).

1. Section 1 of the Fourteenth Amendment provides that no state shall enact any laws that "deny to any person within its jurisdiction the equal protection of the laws," and Section 5 gives Congress "power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." Like the necessary and proper clause (United States Constitution, Article 1, Section 8, clause 18), the enforcement clauses of the Civil War Amendments are broad affirmative grants of legislative power:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-346 (1879). Accord: *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980); *Katzenbach* v. *Morgan*, 384 U.S. 641, 650-651 (1966); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324-327 (1966). Thus, as this Court has repeatedly held, Congress' power to legislate pursuant to the enforcement clauses of the Civil War Amendments is not limited to providing remedies for violations of the substantive provisions of those amendments. See, *e.g.*, *City of Rome* v. *United States*, *supra*, 446 U.S. at 173-178; *Oregon* v.

Mitchell, 400 U.S. 112, 133-134 (Black, J.), 233-236 (Brennan, White, Marshall, JJ.), 283-284 (Stewart, J.), 216 (Harlan, J.), 144-147 (Douglas, J.) (1970);[14] *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 648; *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 333-334.

Under Section 5 of the Fourteenth Amendment Congress may enact any law reasonably deemed necessary and proper to assure and give meaning and substance to the rights established in Section 1. For example, Congress may adopt prophylactic rules prohibiting conduct that does not violate Section 1, if such rules might reasonably be regarded as necessary to prevent conduct that would violate Section 1 or to make meaningful the rights assured in Section 1 of the Fourteenth Amendment. *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 652-653; see *City of Rome* v. *United States*, *supra*, 446 U.S. at 177; *Oregon* v. *Mitchell*, *supra*, 400 U.S. at 216 (Harlan, J.); cf. *Griffin* v. *Breckenridge*, 403 U.S. 88, 104-105 (1971); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437-444 (1968). Congress may also prescribe action that is not constitutionally required if it is reasonably regarded as necessary to redress past misconduct. See *Fullilove* v. *Klutznick*, 448 U.S. 448, 476-478 (Burger, C.J.), 503-504 (Powell, J., concurring) (1980). And, of course, Congress may

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[14] There was no opinion for the Court in *Oregon* v. *Mitchell*. Nevertheless, the Court unanimously upheld Congress' five-year ban on the use of literacy tests in state and national elections, although literacy tests are not per se invalid under Section 1 of the Fifteenth Amendment, *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959). Justice Douglas relied on Section 5 of the Fourteenth Amendment; the other eight Members of the Court relied on Section 2 of the Fifteenth Amendment.

provide remedies for violations of the substantive provisions of Section 1. *E.g., Ex parte Virginia, supra.*

Thus, while the Equal Protection Clause does not prohibit a state's use of an employment test that has a racially disproportionate impact (*Washington* v. *Davis*, 426 U.S. 229 (1976)) or a veterans' employment preference that has a disproportionate impact on persons of one sex (*Massachusetts* v. *Feeney*, 434 U.S. 884 (1977)) or a mandatory retirement age of 50 for uniformed police officers (*Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976)), Section 5 of the Fourteenth Amendment empowers Congress to prohibit the use of such devices if prohibition would constitute "appropriate legislation" to enforce the provisions of the Equal Protection Clause. Such a prohibition would be "appropriate legislation" under Section 5 if (1) it reasonably "may be regarded as an enactment to enforce the Equal Protection Clause" (*Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 651); (2) it "is 'plainly adapted to that end'" (*ibid.*); and (3) it "is not prohibited by but is consistent with 'the letter and spirit of the constitution'" (*ibid.*). We think it too plain to require argument that legislation prohibiting the use of employment tests that have the effect of discriminating against racial minorities or women would constitute "appropriate legislation" to enforce the Equal Protection Clause of the Fourteenth Amendment. Cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). We think it equally plain that legislation prohibiting *arbitrary* age discrimination is no less "appropriate." Appellees have expressed a contrary view (Mot. to Aff. at 7-9); we therefore elaborate.

2. The Equal Protection Clause of the Fourteenth Amendment promises that all persons similarly situ-

ated will be similarly treated by their government; the Equal Protection Clause assures that a state government will distinguish among those within its jurisdiction only upon reasonable grounds having some relationship to the goals to be achieved. See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, No. 80-5950 (Feb. 24, 1982), slip op. 16-20 (plurality opinion); slip op. 2 (Powell, J.); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Reynolds* v. *Sims*, 377 U.S. 533 (1964). Drawing lines between groups of individuals—*i.e.* selecting the relevant classifying feature—is essentially a legislative function. See, *e.g.*, *Schweiker* v. *Wilson*, 450 U.S. 221, 234-235 (1981); *United States R.R. Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980). As this Court noted in *Massachusetts Board of Retirement* v. *Murgia*, *supra*, 427 U.S. at 314, the rational-basis standard for evaluating Equal Protection claims "reflect[s] the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." See generally *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting). That "the line might have been drawn differently * * * is a matter for legislative, rather than judicial, consideration." *United States R.R. Retirement Board* v. *Fritz*, *supra*, 449 U.S. at 179. Thus, unless the legislative classification is wholly arbitrary, there is generally no basis for a court to invalidate legislation under the Equal Protection Clause. *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303-304 (1976).

The institutional limitations that generally constrain the judiciary to employ such a "relaxed standard" (*Massachusetts Board of Retirement* v. *Murgia*,

supra, 427 U.S. at 314) in evaluating claims based on the Equal Protection Clause are, by definition, inapplicable to Congress. They provide no basis for restricting Congress' power to legislate to enforce the rights created by the Equal Protection Clause of the Fourteenth Amendment under Section 5. A mandatory retirement statute that did not rationally further any legitimate state purpose would violate the Equal Protection Clause, even as measured against the relaxed standard the courts must use. Compare *Logan* v. *Zimmerman Brush Co.*, *supra*, slip op. 15-20 (plurality opinion), slip op. 2 (Powell, J.), with *Massachusetts Board of Retirement* v. *Murgia*, *supra*, 427 U.S. at 314-316.[15] The Age Discrimination in Employment Act simply requires a closer fit between the state's goals and the means used to reach them. If "youth" is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (Section 4(f)(1), 29 U.S.C. 623(f)(1)), the state may use age as a criterion for employment or retire employees who are older than the relevant age. What the Act forbids, however, are arbitrary distinctions based on stereotyped assumptions rather than analysis or determinations based on individual merit. Compare *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 707-710 (1978).[16]

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[15] Of course, nothing in *Murgia* suggests that classifications based on age are totally beyond the purview of Section 1 of the Fourteenth Amendment. See also note 17, *infra*. It would, for example, clearly be unconstitutional for a state to impose capital punishment for traffic offenses on persons aged 45 and over, while imposing only fines on younger persons for the same offenses.

[16] In this respect, the Age Discrimination in Employment Act is similar to Title VII of the Civil Rights Act of 1964. Indeed, as the Fifth Circuit has noted, "[w]ith a few minor

After extensive study of age discrimination in employment, Congress made explicit findings concerning the existence of substantial *arbitrary* discrimination and the pressing need for legislation (Section 2, 29 U.S.C. 621; emphasis added):

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of *arbitrary age limits* regardless of potential for job performance

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exceptions the prohibitions of [the Age Discrimination in Employment Act] are in terms identical to those of Title VII of the Civil Rights Act of 1964 [42 U.S.C. 2000e *et seq.*] except that 'age' has been substituted for 'race, color, religion, sex, or national origin.'" *Hodgson* v. *First Federal Savings & Loan Association*, 455 F.2d 818, 820 (1972) (Tuttle, J.) (footnote omitted); see *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978); *EEOC* v. *Elrod*, *supra*, slip op. 10. Congress first considered enacting legislation to prohibit age-based discrimination during the legislative process that culminated in the enactment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess., Pt. III, 2282-2290, 2298 (1963); H.R. Rep. No. 914, 88th Cong., 1st Sess. 15 (1963); 110 Cong. Rec. 2596-2599, 9911-9913, 13490-13492 (1964), *Legis. Hist. ADEA* 5-8, 9-11, 12-14. Because of its concern that the particular problems associated with age discrimination should be explored more fully (*e.g.*, 110 Cong. Rec. 2596-2597 (1964) (remarks of Rep. Celler), *Legis. Hist. ADEA* 5-6), Congress directed the Secretary of Labor to study the issue prior to enactment of any such legislation (Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, Section 715, 78 Stat. 265). See pages 15-17, *supra*.

has *become a common practice*, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of *arbitrary discrimination* in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to *promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment*; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Having found that the establishment of "arbitrary age limits" had become "common practice" among employers with tragic consequences for older workers, Congress broadly prohibited age discrimination against any individual between the ages of 40 and 65 (later raised to 70), unless the employer could show that "youth" was a bona fide occupational qualification reasonably necessary to the normal operation of the business (Section 4, 29 U.S.C. (& Supp. III) 623).

Of course, as this Court observed in *Massachusetts Board of Retirement* v. *Murgia*, *supra*, 427 U.S. at

315, "physical ability generally declines with age." It does not follow, however, that this general truth can support mandatory retirement at any particular age or in any particular kind of job. For example, age 55 but not 50 might be a justifiable retirement age for a firefighter; neither may be appropriate for a fire department administrator. See *EEOC* v. *City of St. Paul*, 500 F. Supp. 1135 (D. Minn. 1981), aff'd, No. 81-1037 (8th Cir. Mar. 2, 1982). The evidence before Congress in 1967 indicated, however, that in too many cases employers prescribed age limitations that were purely arbitrary, based on nothing more substantial than the general truth that physical ability declines with age and assumptions about the significance of that fact. See, *e.g.*, Secretary, United States Department of Labor, *The Older American Worker: Age Discrimination in Employment* 7-8 (1965), *Legis. Hist. ADEA* 24-25. As the Secretary of Labor concluded in his report to Congress in 1965, "[t]here is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability." *The Older American Worker*, *supra*, at 27, *Legis. Hist. ADEA* 37. Congress' decision to prohibit all discrimination on the basis of age against individuals between 40 and 65 years of age but to permit employers to justify the use of age as an employment criterion was in part a response to this widespread use of arbitrary age limits based on assumptions too readily accepted. Given the serious consequences for the individual and the minimal burden on the employer, Congress' action was plainly adapted to preventing arbitrary discrimination based on age.

The Act is consistent with both the letter and spirit of the Constitution.[17] Appellees contend that the Age Discrimination in Employment Act is not "appropriate legislation" to "enforce" the Equal Protection Clause of the Fourteenth Amendment because it (Mot. to Aff. at 8-9) "in effect, authorize[d] the states to discriminate against employees who are

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[17] Contrary to appellees' apparent assertion, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), provides no support for the proposition that (Mot. to Aff. at 8) "classifications based upon age do not fall within the Equal Protection Clause" or that such classifications are per se inappropriate subjects for legislation under Section 5 of the Fourteenth Amendment. A majority of the Court voted to invalidate Congress' attempt to lower the voting age in state elections from 21 to 18, but no one suggested that any classification based on age is outside the scope of the Equal Protection Clause or that such a classification is necessarily an inappropriate subject for Section 5 legislation. Justice Black took the position that the Constitution reserved to the states the power to establish voter qualifications in state and local elections and, unless necessary to remedy racial discrimination, Congress could not interfere with the states' exercise of that power. See 400 U.S. at 130. Justice Harlan voted to invalidate the legislation because, in his view, the Fourteenth Amendment simply did not encompass "political rights" or, more specifically, the right to vote and, therefore, Congress had no power to legislate with respect to voter qualifications pursuant to Section 5. 400 U.S. at 154-200. Justice Stewart, writing for himself, Chief Justice Burger, and Justice Blackmun, agreed with Justice Black that the Constitution reserves to the states the power to set voter qualifications, including reasonable age limitations, and concluded that, unlike the situation presented in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), there was no basis for regarding reduction of the minimum voting age to 18 as necessary to prevent invidious discrimination of any sort. 400 U.S. at 293-296. Outside the electoral context, classifications based on age are subject to the same scrutiny under the Fourteenth Amendment as are other legislative classifications. See note 15, *supra*.

younger than 40, or older than 70," apparently suggesting that the Act is, therefore, inconsistent with the Equal Protection component of the Fifth Amendment Due Process Clause. The short answer is that the Act does not *authorize* discrimination on the basis of age at any age or deprive any individual of rights he otherwise would have; it simply does not prohibit age discrimination against an individual who is younger than 40 or older than 70. See, *e.g.*, *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 657; *EEOC* v. *County of Calumet*, *supra*, 519 F. Supp. at 201-202 n.4. It is, of course, within the legislative discretion to address only those manifestations of a problem that seem especially acute, or otherwise to proceed one step at a time. See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).[18]

Thus, the Age Discrimination in Employment Act is "appropriate legislation" to enforce the Fourteenth Amendment because (1) it is an enactment "to enforce" the Equal Protection Clause of that provision; (2) it is plainly adapted to that end; and (3) it does not offend any provision of the Constitution. The lower courts that have considered the issue are, accordingly, in general agreement that Congress' 1974 extension of the Act to protect state and local government employees against age discrimination is "appropriate legislation" to enforce the Fourteenth Amendment. See *EEOC* v. *Elrod*, No. 80-2810 (7th Cir. Mar. 16, 1982), slip op. 3-15; *Arritt* v. *Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Adams* v. *James*, 526 F. Supp. 80, 84 (M.D. Ala. 1981); *EEOC* v. *County of Calumet*, *supra*, 519 F. Supp. at 196-200;

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[18] No other constitutional objection to the Act has been suggested.

Johnson v. *Mayor of Baltimore*, 515 F. Supp. 1287, 1292 (D. Md. 1981); *Carpenter* v. *Pennsylvania Liquor Control Board*, 508 F. Supp. 148, 149 (E.D. Pa. 1981); *Marshall* v. *Delaware River and Bay Authority*, 471 F. Supp. 886, 891-892 (D. Del. 1979); *Remmick* v. *Barnes County*, 435 F. Supp. 914, 916 (D.N.D. 1977); *Aaron* v. *Davis*, 424 F. Supp. 1238, 1241 (E.D. Ark. 1976); *Usery* v. *Board of Education*, 421 F. Supp. 718, 720-721 (D. Utah 1976). Contra, *Taylor* v. *Department of Fish and Game*, 523 F. Supp. 514 (D. Mont. 1981).

Accordingly, Section 5 of the Fourteenth Amendment and, for reasons previously discussed, the Commerce Clause each independently supports the constitutionality of the Act as here applied.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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No. 81-554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT,
v.
STATE OF WYOMING, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

BRIEF FOR STATE OF WYOMING, ET AL.

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QUESTION PRESENTED

Whether the 1974 extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to the states, as applied, violates the Tenth Amendment.

PARTIES TO THE PROCEEDINGS BELOW

Additional defendents in the district court were:

Ed Herschler, individually and as Governor of the State of Wyoming and as ex officio member of the Wyoming Game and Fish Commission; the State of Wyoming Game and Fish Department; Earl M. Thomas, individually and as Director of the State of Wyoming Game and Fish Department; John Anselmi, individually and as President of the State of Wyoming Game and Fish Commission; J.W. "Wes" Meyers, individually and as Vice President of the State of Wyoming Game and Fish Commission; Verne Barton, Jr., individually and as a member of the State of Wyoming Game and Fish Commission; Dave Wheeler, individually and as a member of the State of Wyoming Game and Fish Commission; Alice Hayes, individually and as a member of the State of Wyoming Game and Fish Commission; Fran Osborn, individually and as a member of the State of Wyoming Game and Fish Commission; Gene Bombi, individually and as a member of the State of Wyoming Game and Fish Commission; and the Wyoming Retirement System.

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EQUAL EMPLOYMENT
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR STATE OF WYOMING, ET AL.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-13a) is reported at 514 F.Supp. 595.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution, the Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 621 *et seq.*, and the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Section 31-3-101 *et seq.* (W.S. 1977), are set forth at J.S. App. 18a-19a.

STATEMENT

The Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 621 *et seq.*, (ADEA) prohibits arbitrary age discrimination against employees between the ages of 40 and 70 years. 29 U.S.C. (& Supp. III) 623 and 631(a). The Act prohibits the involuntary retirement of any employee within the protected class unless the retirement was for a reasonable factor other than age or age is a bona fide occupational qualification, 29 U.S.C. (& Supp. III) 623(f)(1), (2). As originally passed, the Act applied only to certain private employers, Pub.L. 90-202, Section 11(b), 81 Stat. 605; however, as part of the Fair Labor Standards Amendments of 1974, Pub.L. 93-259, the Act was extended to include federal, state, and local government employers. 29 U.S.C. 630(b) and 633a.

The Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Section 31-3-101 *et seq.*, (W.S. 1977), allows the involuntary retirement of game wardens who are full-time law enforcement officers at age 55. Section 31-3-107(c) (W.S. 1977).

Bill Crump was a warden covered by the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, *supra*, and was involuntarily retired at age 55. Crump filed a charge of unlawful age discrimination with the Equal Employment Opportunity Commission and, after conciliation efforts failed to produce satisfactory results, the Commission filed suit in the United States District Court for the District of Wyoming. The Commission sought a declaration that the Wyoming statute was invalid as a violation of the Age Discrimination in Employment Act, sought back wages, liquidated damages and reinstatement for Mr. Crump, and others similarly situated, as well as injunctive relief. (Complaint, R., 4-5).

The State of Wyoming and all other individual defendants moved to dismiss the complaint on the ground that the 1974 extension of the Age Discrimina-

tion in Employment Act to the states was solely a commerce power enactment and violated the Tenth Amendment as applied and that, if passed pursuant to the Fourteenth Amendment, was in excess of Congress' power.

The district court dismissed the Complaint, finding that the Act's extension was based solely on the commerce power and that, under the rule of *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Tenth Amendment prevented the application of the Act to the states with regard to law enforcement officers.

In view of its findings that only the commerce power was concerned, the district court did not reach the question of whether the Fourteenth Amendment would support the 1974 amendment.

SUMMARY OF THE ARGUMENT

The extension of the Age Discrimination in Employment Act to the states and their political subdivisions was an exercise of Congress' commerce power. Congress expressed its intent to use its commerce power both in the Act itself and in the legislative history of the Act.

As an exercise of the commerce power, the Act may not be applied to the states in a manner which regulates the states as states, addresses matters that are attributes of state sovereignty, and directly impairs the states' ability to structure integral operations in areas of traditional state functions, unless some overriding federal interest is concerned. *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, ____ U.S. ____, 69 L.Ed.2d 1 (1981).

Because the Act, as applied, concededly regulates the states as states, attempts to regulate the conditions of employment of state employees, and will lead to the restructuring of the retirement system for state law enforcement officers, the Act violates the Tenth Amend-

ment. That no overriding federal interest is presented is demonstrated by the existence of a virtually identical retirement system imposed for federal law enforcement officers and firefighters by the 1974 Congress.

Nor is the Fourteenth Amendment an appropriate power base for the 1974 amendment. If it can be implied, in the absence of express congressional intent, that the Act was passed pursuant to Congress' power under the Enforcement Clause of the Fourteenth Amendment, the Act, as applied, exceeds that power. The Act is neither "appropriate legislation" nor does it "enforce" the provisions of the Fourteenth Amendment. The Act is not "appropriate legislation" because, to the extent that age may be viewed to be within the guarantees of equal protection, the Act violates equal protection by creating a class based solely on age. However, because age discrimination is not a proper subject matter for regulation through the Fourteenth Amendment in any event, the Act does not enforce the provisions of the Amendment. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

The overall effect of the ADEA in this case is to supplant state policy decisions by the federal government. This result cannot be sanctioned under either the Commerce Clause or the Fourteenth Amendment. As applied, the ADEA denies the separate and independent sovereignty of the State of Wyoming.

ARGUMENT

Introduction

The statute here challenged by the Equal Employment Opportunity Commission (EEOC) is the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act (Patrol/Warden Plan) Section 31-3-101, *et seq.*, (W.S. 1977, as amended). The Patrol/Warden Plan provides generally for the retirement of those members of the Wyoming Highway Patrol who are sworn officers, Section 31-3-102(a)(iii), (W.S. 1977), and any

employee of the Wyoming Game and Fish Department who is "commissioned as a full-time law enforcement officer." Section 31-3-102(a)(iv), (W.S. 1977).

Employees in the Patrol/Warden Plan contribute 11.02% of their salaries to the retirement fund, Section 31-3-104, (W.S. 1981 Supp.), and the employer contributes 11.33% of the employees' salaries. Section 31-3-105, (W.S. 1981 Supp.). Other employees of the State are covered by the general retirement plan which provides for contributions by the employee and employer of 5.57% and 5.68%, respectively. Sections 9-5-211, 9-5-212, (W.S. 1981 Supp.).

Employees of the State covered by the Patrol/Warden Plan, since June 30, 1977, are to be retired at age 55, except that they may continue in service on a year-to-year basis "with the approval of the employer and under conditions as the employer may prescribe," until age 65. Section 31-3-107(c), (W.S. 1977).

The retirement benefit is equal to 2% of the employee's final average salary for each year of service to a maximum of 50% of the final average salary. Section 31-3-110 (W.S. 1977). The "final average salary" is the average monthly salary paid during the employee's final three years of service. Section 31-3-102(a)(ix), (W.S. 1977).

The Patrol/Warden Plan was enacted in 1973. Laws of Wyoming 1973, Ch. 157, Section 1.

In 1967, the Congress passed the Age Discrimination in Employment Act (ADEA). Pub.L. 90-202; 29 U.S.C. 621, *et seq.*

As originally passed, the definition of employer was limited to persons "engaged in an industry affecting commerce. . ." Pub.L. 90-202, Section 11(b); 29 U.S.C. 630(b).

In 1974, the ADEA was amended to include states and subdivisions of states as employers. Pub.L. 93-259, Section 28(a)(1)-(4); 29 U.S.C. 630(b). Also in 1974, the

ADEA was extended to certain employees of the federal government. *Id.*, Section 28(b)(2); 29 U.S.C. 633a.

In 1978, the ADEA was again amended to remove the exemption for retirement plans which required retirement at an age less than the upper limit of the protected class, Pub.L. 95-256, Section 2(a); 29 U.S.C. 623(f)(2),[1] and raised the upper age limit of the protected class from 65 to 70. *Id.*, Section 3(a); 29 U.S.C. 631(a).

As it currently exists, the ADEA purports to prevent the states and their political subdivisions from mandatorily retiring their employees at any age less than 70, unless the retirement is for a reasonable factor other than age, or age is a bona fide occupational qualification. 29 U.S.C. 623(f)(1).

A. THE ADEA IS AN EXERCISE OF CONGRESS' COMMERCE POWER. AS APPLIED, THE ADEA VIOLATES THE TENTH AMENDMENT.

It is the position of the State of Wyoming that the 1974 amendment to the ADEA which extended coverage of the Act to the states is invalid under the Commerce Clause of the United States Constitution, Art. I, Section 8, cl. 3, as a violation of the Tenth Amendment.

That Congress intended to use its commerce power in passing the ADEA is clear. The stated purpose of the ADEA is found in 29 U.S.C. 621:

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

---

[1] The intent of Congress in removing the retirement exemption was to overrule *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977).

> (2) the setting of arbitrary limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

The House Report on the Fair Labor Standards Amendments of 1974 reiterates the policy of the Fair Labor Standards Act of 1938, 29 U.S.C. 201, *et seq.* (FLSA):[2]

> The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of

---

[2] ADEA was extended to the states as Section 28 of the Fair Labor Standards Amendments of 1974. Pub.L. 93-259.

> workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.
>
> It is hereby declared to be the policy of this Act through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

H.R. Rep. 93-913, 93d Cong., 2d Sess. (1974) (*U.S. Code Congressional and Administrative News*, 1974, pp. 2811-2812.)[3]

The same House Report noted this Court's decision in *Maryland v. Wirtz*, 392 U.S. 183 (1963), and made the following findings concerning the authority for the 1974 amendments:

> 1. The "enterprise concept" of coverage is clearly within the power of Congress under the Commerce Clause.
>
> (a) A rational basis for Congress' finding the scheme necessary to the protection of commerce

[3] While these statements appear directed toward the amendments only as related to the FLSA, no other policy is cited in support of the ADEA extension in Section 28.

was the logical inference that the pay and hours of employees of an interstate business who are not production workers, as well as those who are, affect an employer's competition with companies elsewhere. *United States v. Darby*, 312 U.S. 100, followed.

(b) Another rational basis is the promotion of labor peace by the regulation of wages and hours, subjects of frequent labor disputes.

(d) The class of employers subject to the Act, approved in *Darby, supra*, was not enlarged by the addition of the "enterprise concept."

2. The commerce power provides a constitutional basis for extension of the Act to State-operated schools and hospitals.

(a) Congress has "interfered with" State functions only to the extent that it subjects a State to the same minimum wage and overtime pay limitations as other employers whose activities affect commerce.

(b) Labor conditions in schools and hospitals can affect commerce and are within the reach of the commerce power.

(c) Where a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State may be forced to conform its activities to Federal regulation. *United States v. California*, 297 U.S. 175.

3. Questions concerning the States' sovereign immunity from suit and whether particular State-operated institutions have employees handling goods in commerce are reserved for appropriate concrete cases.

H.R.Rep. 93-913, *supra*, (*U.S. Code Congressional and Administrative News*, 1974, pp. 2816-2817.)

With specific reference to Section 28 of the amendments, that which extended coverage of the ADEA to the states, the House Report noted, "The amendment is a logical extension of the committee's decision to extend FLSA coverage to Federal, State, and local government employees." *Id.*, p. 2849. This notation substantially reinforces the conclusion that the 1974 amendment was directly tied to Congress' commerce power.

Additional evidence that Congress was legislating under its Commerce Clause power was developed when two years later, this Court rendered its opinion in *National League of Cities v. Usery*, 426 U.S. 833 (1976). In that decision, the Court recognized Congress' power under the Commerce Clause to extend coverage of the FLSA to the states, but held that the Tenth Amendment acted as an affirmative limitation on that power. The Court then invalidated the extension of minimum wage and overtime provisions of the 1974 amendments to the states and political subdivisions. The test for determining whether congressional action is limited by the Tenth Amendment is:

> First, there must be a showing that the challenged statute regulates the "States as States," [*National League of Cities*] at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.*, at 845. And third, it must be apparent that the State's compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional function." *Id.*, at 852.

Hodel v. Virginia Surface and Mining Reclamation Association, Inc., ____ U.S. ____, 69 L.Ed.2d 1, 23 (1981).

When these limitations are applied to this case, the

result is revealing. EEOC concedes that, since 1974, the ADEA regulates the states as states and that wildlife management is a traditional government function. (Brief for the EEOC, p. 9.)[4] The remaining issues to be resolved are whether the ADEA regulates a matter which is indisputably an attribute of state sovereignty and whether ADEA impairs Wyoming's ability to structure the integral operations of the conceded traditional function.

Wyoming is aware of no exhaustive list of what is included in the term "attribute of sovereignty." Nonetheless, this Court has recently observed that ". . .The *National League of Cities* opinion focused its delineation of the 'attributes of sovereignty'. . .on a determination as to whether the State's interest involved 'functions essential to separate and independent existence.' " *United Transportation Union v. Long Island Rail Road Co.*, No. 80-1925, slip opinion, at 6-7, n. 11. (March 24, 1982), quoting *Layfayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (concurring opinion).

The establishment of employment terms for State employees is indisputably an attribute of sovereignty. *National League of Cities, supra.* EEOC posits that the ability to arbitrarily discriminate on the basis of age is not an attribute of state sovereignty. Wyoming agrees; however, this case concerns not arbitrary discrimination, but the setting of a reasonable classification based on age for state law enforcement officers. That the classification is supported by a rational basis is demonstrable both by comparison of the Wyoming system with the federal system and by the past decisions of this Court. The classification is reasonable both in fact and in law.

---

[4] As noted above, the Game and Fish Department employees covered by the Patrol/Warden plan are those who are full-time law enforcement officers. (See Motion to Affirm, Appendix A). Both police and parks and recreation functions were recognized in *National League of Cities, supra,* to be traditional state functions. 426 U.S, at 851.

1. The Federal Model.

First, the analysis of what is an attribute of sovereignty must end, not with what the ADEA states by its own terms, but rather, how the ADEA as applied affects the state's "ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547, n. 7 (1975).

In this case, the ADEA has been used in an attempt to invalidate a provision of a state retirement law which establishes the employment terms of state law enforcement officers. While EEOC may argue that it seeks only to invalidate the age 55 retirement provision of the Patrol/Warden Plan, Section 31-3-107(c), (W.S. 1977), because the retirement age is linked to the contributions paid,[5] no reason would exist to continue any other provision of the Plan. When the effect of the ADEA as applied in this case is considered, the result is the complete restructuring of the retirement system provided for Wyoming law enforcement officers.

The conclusion is irresistible that when viewed in

[5] While Wyoming has no official legislative history, the contribution rate for the Patrol/Warden Plan of approximately double that of the general retirement system is apparently related to providing actuarial soundness to the system for early retirement. Since the 2% per year of service formula is the same for both systems, no other conclusion is logical. See Section 9-5-217(e), (W.S. 1981 Supp.). Nor does allowing retirement at age 55 on the decision of the employee suffice. If the state has a legitimate desire to enable those law enforcement officers who, due to the rigors of their occupations, cannot work beyond 55 to retire with a maximum benefit, the fund **must** be paid into at an accelerated rate. While it may be actuarially possible to balance the fund periodically based upon the number of employees who remained in service beyond 55, this would require the complete restructuring of the benefit program as well. Therefore, the "modest" requirements of the ADEA become demands to the Wyoming legislature to enact amendments to contribution rates on a periodic basis and become an affirmative obligation as to how Wyoming spends its fiscal resources. (EEOC in this case has prayed for back wages and "all benefits," and requested continued employment until age 70. R., 4-5.)

its entirety, the ADEA, as applied in this case, represents an attempt by Congress "to regulate directly the activities of States as public employers," *National League of Cities, supra,* at 841; it "directly supplants the considered policy choices of the States' elected officials" as to how they wish to structure a retirement program for their employees, *id.,* at 848; and it "directly penalizes the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose." *Id.,* at 849.

In fact, Congress has never expressed an intent that law enforcement officers be retained in employment until age 70. The 1974 Congress enacted Pub.L. 93-259, Section 28(a)(5), (b)(1), which prohibited age discrimination in most federal employment, but also **reduced** the mandatory retirement age from 70 to 55 for virtually all federal law enforcement officers and firefighters.[6] Like the Wyoming law, employees subject to the federal statute may continue their employment with the approval of the employer. Pub.L. 93-250, codified at 5 U.S.C. 8335(b).

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[6] In H.R.Rep. No. 95-527, 95th Cong., 1st Sess., p. 12 (Reprinted in U.S. EEOC *Legislative History of the Age Discrimination in Employment Act* (Leg. Hist.) p. 372, this policy was reapproved as follows:

> While it is the primary purpose of this legislation to limit mandatory retirement. . .it is not intended that the bill prohibit mandatory retirement. . .where age is a bona fide occupational qualification. It is recognized that certain mental and physical capabilities may decline the age and in some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers. For example, jobs such as some of those in air traffic control and in law enforcement and firefighting have very strict physical requirements on which the public safety depends.

Hence, while EEOC zealously prosecutes state and local governments in cases such as this, it recognizes that Congress did not intend for such cases to be filed. See also: S.Rep. No. 95-493, 95th Cong., 1st Sess., (1977) p. 10-11 (Reprinted in *Leg. Hist., supra,* at 433-444.)

The rationale for this reduction of federal law enforcement officer retirement age is simply stated:

> The history of retirement legislation dealing with law enforcement officers and firefighters shows congressional intent to liberalize retirement provisions so as to make it feasible for those employees to retire at age 50. This intent has been based on the nature of the work involved and the determination that these occupations should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands which are far more taxing physically than most in the Federal Service. They are occupations calling for the strength and stamina of the young rather than the middle aged. Older employees in these occupations should be encouraged to retire.

S. Rep. No. 93-948, 93d Cong., 2d Sess. (1974), (*U.S. Code Congressional and Administrative News*, 1974, p. 3699.)

In addition, this Court has recognized that non-law enforcement officers may be subjected to early retirement. *Vance v. Bradley*, 440 U.S. 93 (1979) (foreign service officers). And see: 5 U.S.C. 8335(a) (air traffic controllers retire at age 56); 5 U.S.C. 8335(c) (employees of Panama Canal Company, or Canal Zone Government, or Alaska Railroad retire at 62).

That Congress may be studying mandatory retirement ages for federal law enforcement officers and may in the future repeal or amend 5 U.S.C. 8335, as EEOC suggests (Brief for EEOC, p. 19, n 10.), does not alter the fact that mandatory retirement at age 55 for federal law enforcement officers was deemed reasonable by the 93d Congress. Furthermore, it is sheer speculation that Congress will eliminate this provision. The fact is, it currently exists as a statement of congressional policy.

2. Wyoming's age 55 retirement is rational.

Second, EEOC takes the position that Wyoming's law enforcement retirement plan is arbitrary due to the fact that this case is before the Court on a record devoid of evidence. No such conclusion can be drawn from the record.[7] Wyoming does not here assert "a prerogative to be arbitrary" (Brief for the EEOC, p. 19.), but rather, asserts a prerogative to exercise the same attributes of sovereignty that the United States exercises in matters of employment relations. Moreover, this Court has held that the mandatory retirement of law enforcement officers by the states, at an age less than other state employees, is not arbitrary, but is supported by a rational basis. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

3. The inadequacy of the BFOQ defense.

EEOC asserts that such an attribute of sovereignty need not be recognized because the bona fide occupational qualification defense (BFOQ)[8] adequately protects the states' policy choices regarding the establishment of state retirement programs. However, experience demonstrates the opposite. In *Johnson v. Mayor of Baltimore*, 515 F.Supp. 1287 (D. Md. 1981) *cert. denied*, No. 81-1112 (Feb. 22, 1982), the trial court found that age is not a bona fide occupational qualification for city firefighters. The experts presented in that case by the plaintiff were more impressive than those presented by the defendant.

In *EEOC v. City of St. Paul*, 500 F.Supp. 1135, *aff'd*, No. 81-1037 (8th Cir. March 2, 1982), the trial court found that although age was not a bona fide occupational

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[7] The case is presented after the district court granted Wyoming's Motion to Dismiss. No evidence of a bona fide occupational qualification affirmative defense was required or presented in that no answer was filed.

[8] See 29 U.S.C. 623(f)(1).

qualification for district chiefs, it was clearly a bona fide occupational qualification for firefighters. And compare *Beck v. Manheim*, 505 F.Supp. 923 (E.D. Pa. 1981), finding BFOQ for city police officers, with *Adams v. James*, 526 F.Supp. 80 (M.D. Ala. 1981), finding no BFOQ for highway patrolmen. These cases adequately demonstrate the opposing results which may occur at trial of an evidentiary issue. The BFOQ is no protection at all. Rather, it turns this crucial element of state sovereignty into a battle of experts which eliminates the possibility of a coherent and consistent resolution of the issue. It seems to Wyoming to be axiomatic that the retirement of law enforcement officers at ages less than 70 is either reasonable as a bona fide occupational qualification or it is arbitrary discrimination. One or the other of these is true no matter where the case may be tried or which party is able to employ the most impressive experts.[9] Stated differently, if it is reasonable for Congress to require law enforcement officers to retire at age 55, it is not "arbitrary" for the states to do the same.

EEOC's position may appear reasonable at first blush; however, the practical effect of requiring the states to prove that age is a bona fide occupational qualification in each profession to which a retirement age less than 70 applies, is to reduce the underlying constitutional issue to an evidentiary battle of expert opinions. Wyoming submits that such an approach is inappropriate. The issue here is not whether Wyoming can employ an expert witness who will testify that all or substantially all game wardens over age 55 are incapable of performing the duties of their jobs (See, eg. *Arritt v. Grissell*, 567 F.2d 1267 (4th Cir. 1977)), but whether the

[9] *Johnson v. Mayor of Baltimore, supra,* provides an example of the problems incurred when the matter is left to weighing expert testimony. Had the defendant in that case found an expert which the trial judge deemed more impressive, this critical issue to the City of Baltimore may well have been decided contrarily.

legislature of the State of Wyoming has the power to set what it believes are appropriate employment terms for those employed to carry out the duties it has established.

The actual operation of the bona fide occupational qualification defense results in an anomaly. The test requires a showing that all or substantially all employees above the age in question be unable to perform the duties of the particular job and that it is either impossible or impractical to determine ability to perform by reference to any factor other than age. See: *Arritt v. Grissell, supra; Tuohy v. Ford Motor Co.*, 490 F.Supp. 258 (E.D. Mich. 1980).

As applied, this evidentiary hurdle is so stringent that the effect of its use is to elevate age discrimination to a strict scrutiny analysis.[10] This is so even though this Court has repeatedly held that age classifications are not "suspect," nor employment opportunities "fundamental rights." See: *Massachusetts Board of Retirement v. Murgia, supra*, at 312-313, and cases cited therein; *Vance v. Bradley, supra*. In effect, Congress has completely redefined the appropriate tests for equal protection analyses, and the Congress has qualified this Court's decisions on the proper construction of the Fourteenth Amendment through the use of Section 5, and Congress has altered the **substantive** scope of the amendment. The framers of the Fourteenth Amendment never intended that Congress possess this power. See *Katzenbach v. Morgan* 384 U.S. 641, 668 (1966) (Harlan, J., dissenting). This

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[10]In practice, this test is a sham. A governmental entity could rely on the expert opinions of one hundred doctors specializing in the physiological effects of aging prior to adopting an early retirement age for certain employees only to have their work destroyed in trial by an expert deemed more impressive to the trier of fact. See: *Johnson v. Mayor of Baltimore, supra*. The practical ramifications of this fact are that the "factual basis for believing" that age is a bona fide occupational qualification is irrelevant, and that once suit is brought, the belief of the governmental entity may be second guessed by the court or jury. (See: Brief for the EEOC, pp. 10-11, n. 4.)

reclassification occurs because Congress has attempted to make unlawful, under the Fourteenth Amendment, that which was already decided not to violate equal protection.[11] In effect, Congress has amended the Fourteenth Amendment through legislation.

The establishment of retirement systems for state employees is nothing more or less than the setting of an employment term. The establishment of a retirement system for state employees is an "attribute of sovereignty" in precisely the same fashion as is the setting of wages and hours which those employees must work. To allow the ADEA to be applied in the manner which EEOC seeks in this case completely displaces "the policy choices of the States' elected officials. . ." *National League of Cities, supra,* at 848.

It cannot be denied that the Patrol/Warden Plan inherently selects certain employees for retirement based only on age. Section 31-3-107(c), (W.S. 1977). However, this factor alone is not dispositive of even a facial conflict between the Patrol/Warden Plan and the ADEA. The apparent purpose of the mandatory retirement age is the same here as this Court recognized in *Murgia, supra;* that is, to assure the physical preparedness of Wyoming game wardens to perform their duties. 427 U.S. at 314-315. Further, the Patrol/Warden Plan demonstrates the Wyoming legislature's implicit finding that the positions of Wyoming highway patrolmen and Wyoming game wardens are "occupations [which] should be composed. . .of young men and women physically capable of meeting the vigorous demands. . ." of the duties of these occupations. S.Rep. No. 93-948, 93d Cong., 2d Sess. (1974), (*U.S. Code Congressional and Administrative News,*

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[11] In the case of suspect classes or fundamental rights, of course, such a test would be appropriate. Therefore, while Congress might outlaw literacy tests under the Fifteenth Amendment, where such tests tend to discriminate based on national origin, this case presents no comparable goal of protection of a fundamental right.

1974, p. 3699). Physical fitness of game wardens is, without question, a legitimate legislative goal to be considered in structuring of the operations of the enforcement arm of the Wyoming Game and Fish Department.

In this Court's decision in *Vance v. Bradley, supra,* the decision of the district court that the early retirement of foreign service officers was "inherently discriminatory" was reversed, on the basis that its purpose was not to reward "youth qua youth," but to assure fitness in the service. The Patrol/Warden Plan presents the same issue. To allow the construction of the ADEA in the fashion suggested by EEOC not only impairs Wyoming's ability to structure the operation of the Game and Fish Department, but completely usurps the discretion which is properly reposed in Wyoming's legislature. See *Vance v. Bradley, supra,* at 97, n. 12.

Finally, Wyoming is aware that even though all elements of the *National League of Cities* test may be present, the Congress may still exercise its commerce power when an overriding federal interest is involved. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., supra,* at 23, n. 29. Wyoming submits that there is no supervening federal interest in this case in view of Congress' expression that the duties of certain federal employees are such that early retirement is required. Not only is early retirement for some occupations rational, but it is sensible. See: *Thomas v. U.S. Postal Inspection Service,* 647 U.S. 1035, 1037 (10th Cir. 1981).

In summary, the EEOC construes and applies the ADEA in a manner which usurps the power of a state legislature by requiring a judicial determination of the reasonableness of a state legislative act. This construction is suggested even though the same Congress which extended the ADEA to the states passed legislation virtually identical to that challenged here. If such a construction is allowed to prevail, ". . .there would be little left of the States' 'separate and independent existence.'"

National League of Cities, supra, at 851, quoting *Coyle v. Oklahoma,* 221 U.S. 559, 580 (1911).[12]

B. THE ADEA IS NOT APPROPRIATE LEGISLATION TO ENFORCE THE FOURTEENTH AMENDMENT.

In *Pennhurst State School v. Halderman,* 451 U.S. 1 (1981), this Court held, in determining whether Section 111 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (42 U.S.C. (& Supp. III) 6010) created substantive legal rights in favor of the retarded residents of a state institution, that the test for determining **when** Congress intends to enforce the guarantees of the Fourteenth Amendment is simply when Congress states its intent to so act. 451 U.S., at 16.[13] The court illustrated this holding with citations to *Katzenbach v. Morgan,* 384 U.S. 641 (1966); *Oregon v. Mitchell,* 400 U.S.112 (1970); and *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1975), demonstrating in each case the expressed intent of Congress to enforce the guarantees of the Fourteenth Amendment.[14]

Here, on the contrary, many attempts were made

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[12] EEOC raises the question of economic impact as absent from the record. (Brief for EEOC, pp. 12-14.) Wyoming believes that the question of economic impact is irrelevant. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., supra,* at 26, n. 33, ". . .the determinative factor in [*National League of Cities*] was the nature of the federal action, not the ultimate economic impact on the States." [citations omitted].

[13] The majority in *Pennhurst, supra,* would require an explicit statement of intent to invoke the Fourteenth Amendment enforcement power. Three Justices (White, Brennan, & Marshall) would be satisfied if there were a "conclusive basis" for finding such an intent. As shown herein, ADEA contains neither.

[14] EEOC contends that this language is limited to cases of "statutory construction, but it has no application to a case such as this where Congress' intention to impose its policy on the states is clear." (Brief for the EEOC, p. 22, n. 11.) Wyoming submits that congressional in-

by certain congressmen to include age as a classification in Title VII of the Civil Rights Act (42 U.S.C. 2000e); however, such legislation always failed. (See, eg. analysis of legislative history in *Arritt v. Grissell, supra,* at n. 11.) Moreover, that the President indicated in his message to Congress that age discrimination "can be as great an evil in our society as discrimination based on race or religion. . ." sheds no light on the question of which constitutional power was used by Congress in its attempt to reach the states. (See: H.R.Rep. No. 93-913, 93d Cong., 2d Sess. (1974), (*U.S. Code Congressional and Administrative News,* 1974, p. 2849.).

In *Pennhurst, supra,* this Court dismissed similar attempts to divine legislative intent tersely: "Respondents read too much into these scattered bits of legislative history." ____ U.S., at ____, 67 L.Ed.2d at 709. Wyoming does not deny that arbitrary age discrimination may be a societal evil. Wyoming does not deny that many congressmen viewed age discrimination as a subject matter which could properly have been included in Title VII of the Civil Rights Act (42 U.S.C. 2000e *et seq.*). Wyoming submits, however, that the legislative history upon which EEOC relies offers no solution to the question of which power Congress used in enacting ADEA and in adopting the 1974 amendments.

After this Court's decisions in *National League of Cities, supra,* and *Fitzpatrick v. Bitzer, supra,* lower courts confronted with a Tenth Amendment challenge to the 1974 ADEA amendments, relying on note 17 in *National League of Cities,* almost invariably found that the 1974 amendments were proper exercises of Congress' power under Section 5 of the Fourteenth Amendment. See: *Arritt v. Grissell, supra,* (relying on Senator Javits' attempt

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tent to impose its policy on the states is no clearer here than in the other sections of the Fair Labor Standards Amendments of 1974 struck down in *National League of Cities, supra.*

to include age within Title VII of the Civil Rights Act); *Usery v. Board of Education of Salt Lake City*, 421 F.Supp. 718 (D. Utah 1976), (ADEA found valid under both Commerce Clause and Section 5, Amendment XIV, due to similarity between Title VII and ADEA); *Aaron v. Davis*, 424 F.Supp. 1238 (E.D. Ark. 1976), (ADEA compared to Title VII); *Remmick v. Barnes County*, 435 F.Supp. 914 (D.N.D. 1977), (ADEA valid enforcment of equal protection).[15]

Each of these cases implies a Fourteenth Amendment power base for ADEA solely because ADEA is concerned with discrimination or because there are similarities between ADEA and Title VII. Each case ignored the express recitations of Congress in the Act noted above; ignored that ADEA adopts the enforcement scheme of the FLSA, 29 U.S.C. 626(b);[16] ignored that ADEA was extended to the states by the same act as

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[15] Contra, *Usery v. Manchester East Catholic Regional School Board*, 430 F.Supp. 188 (D.N.H. 1977) *Taylor v. Dept. of Fish & Game*, 523 F.Supp. 514 (D. Mont. 1981); *Morgan v. Dept. of Offender Rehabilitation*, No. C81-2118A (N.D. Ga. March 31, 1982). Lower courts' reliance on such cases as *Lorillard v. Pons*, 434 U.S. 535 (1978), is misplaced. That case construed the similarities and differences between ADEA and Title VII to determine whether Congress intended a right to jury trial in ADEA actions. That the prohibitions contained in ADEA are adopted from Title VII does not lead to the conclusion that ADEA is adopted under the Fourteenth Amendment. See note 17, *infra*.

[16] Of significance in this regard, it should be noted that EEOC claims back wages for Mr. Crump. (See: Complaint, Prayer for Relief R. 4.) Under 29 U.S.C. 622 (b), these damages are required to be "deemed to be unpaid minimum wages or unpaid overtime compensation" under the Fair Labor Standards Act. If these damages are deemed to be such, they cannot be assessed against the state under *National League of Cities*. EEOC characterizes this language as "word play" (See: Memorandum in Opposition to Defendant's Motion to Dismiss, R. 24.); however, as this Court has recently reaffirmed, "the legislative purpose is expressed by the ordinary meaning of the words used" and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *American Tobacco Co. v. Patterson*, No. 80-1199 (April

was used to extend the FLSA to the states; and ignored that portion of the legislative history which indicated an express reliance on *Maryland v. Wirtz, supra,* and *United States v. Darby,* 312 U.S. 100 (1941).[17]

Assuming that Congress intended to use its Fourteenth Amendment, Section 5 power,[18] ADEA cannot be applied to the states in any event because it is neither "appropriate legislation," nor does it "enforce" the provisions of the Fourteenth Amendment.

1. ADEA is not "appropriate legislation."

The clause of the Fourteenth Amendment invariably cited as that which the ADEA enforces is the Equal Protection Clause. See, eg., *Arritt v. Grissell, supra; EEOC v. County of Calumet.* 519 F.Supp. 195 (E.D. Wis. 1981); *Aaron v. Davis, supra.*

In *Katzenbach v. Morgan, supra,* this Court held that Congress could, under its Section 5 power, prohibit state activity which did not in itself violate the Fourteenth Amendment. Noting the dissent of Mr. Justice Harlan (joined by Stewart, J.), the Court stated that:

> . . .Section 5 does not grant congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress'

5, 1982), slip opinion, at 5, citing *Richards v. United States,* 369 U.S. 1, 9 (1962), and *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980).

[17] That the subject of discrimination may be reached by the commerce power is not questioned. *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964). Therefore, that the ADEA addresses discrimination is no clear indication of the use of the Fourteenth Amendment Enforcement Clause to pass the 1974 amendments.

[18] Section 5 reads:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

> power under Section 5 is limited to adopting measures to enforce the guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be - as required by Section 5 - a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws.

384 U.S. at 651, n. 10.

If it is assumed, for the purposes of this argument, that age discrimination is a proper subject matter for congressional action under Section 5,[19] Congress has here passed a statute which, in effect, dilutes the guarantees of the Equal Protection Clause.

This dilution occurs in that Section 12 of the ADEA (29 U.S.C. (& Supp. III) 631) limits coverage of the Act to "individuals who are at least 40 years of age but less than 70 years of age." The effect of creating a protected class of individuals covered by the ADEA, and defining the class limits solely by age, is to authorize the states to discriminate against persons outside the class. To precisely the same extent that age discrimination is prohibited by the Equal Protection Clause, the ADEA abrogates that protection for persons outside the protected class.[20] That Congress created a class of protected individuals is an implicit recognition that, while arbitrary age discrimination may be evil, discrimination based upon age is not the same as discrimination based upon race, religion, or sex. All governments discriminate based upon age in such matters as driver's licenses, alcohol

[19] In *Murgia, supra*, this Court treated a mandatory retirement case under traditional equal protection principles. Therefore, it might be implied that age is within the protections of the Amendment. See also *Vance v. Bradley, supra.*

[20] If Congress enacted a law which prohibited discrimination based upon race, and them limited the protected class to Caucasians and American Indians, there would be no question that the law was not appropriate to enforce the Fourteenth Amendment.

consumption, marriage, statutory rape, ability to contract, ability to vote, or eligibility to serve in the armed forces.[21] If this is to be the established rule, then the application of the Fourteenth Amendment to age discrimination matters would be little more than a "Chancellor's foot" doctrine.[22]

Furthermore, the decisions of this Court have recognized that discrimination based upon age is not "invidious."[23] *Massachusetts Board of Retirement v. Murgia, supra,* at 313-314; *Vance v. Bradley, supra,* at 96-97. See also *Trafalet v. Thompson,* 594 F.2d 623, 626 (7th Cir. 1979); *Thomas v. U.S. Postal Inspection Service, supra.*[24] Nor is age dis-

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[21] The logical extremes of finding that age is "suspect" are, of course, ludicrous. A 12 year old could demand entrance to a bar based upon evidence that he could hold his alcohol as well as most 40 year olds. Or, a 10 year old could demand the franchise after a test which showed more knowledge of current affairs than the average 22 year old. A 25 year old might demand immediate payment of social security benefits.

[22] The Secretary of Labor, at the time he made his recommendations to Congress, recognized the inherent differences between race or sex based on discrimination and discrimination based on age. In that report, *The Older American Worker: Age Discrimination in Employment* (1965), Secretary Wirtz observed:

> The Nation has faced the fact—rejecting inherited prejudice or contrary convictions—that people's ability and usefulness is unrelated to the facts of their race or color or religion or sex, or the geography of their birth. Having accepted this truth, the easy thing to do would be simply to extend the conclusions derived from it to the problem of discrimination in employment based on aging and be done with the matter. This would be easy—and wrong.

Ibid, at page 1.

[23] (Brief for the EEOC, at p. 25.) If it is true that a congressional belief that age discrimination is "invidious" makes it so, Mr. Justice Harlan's fears in *Katzenbach v. Morgan, supra,* at 668, have become a reality.

[24] At least by August of 1977, the Congress recognized that the decisions of this Court gave no support to any conclusions that age

crimination properly characterized as a subject matter of such historical significance as to be within congress' Section 5 reach to redress past misconduct. *Massachusetts Board of Retirement v. Murgia, supra,* at 313; Cf. *Fullilove v. Klutznick,* 448 U.S. 448 (1980).

2. ADEA does not "enforce" the provisions of the Fourteenth Amendment.

In *Oregon v. Mitchell,* 400 U.S. 112 (1970), this Court invalidated that portion of the Voting Rights Act Amendments of 1970, Pub.L. 91-285, which lowered the voting age from 21 to 18 in state elections, as an inappropriate use of the Fourteenth Amendment enforcement power.

Mr. Justice Black traced the history of the Civil War Amendments and found the following limitations on Congress' Fourteenth Amendment enforcement power:

> While this Court has recognized that the Equal Protection Clause of the Fourteenth Amendment in some instances protects against discrimination other than those on account of race, [citations omitted], it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves.

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discrimination was a subject matter reachable directly under either the Fifth or Fourteenth Amendments in the context of mandatory retirement. *The Next Steps in Combating Age Discrimination in Employment: With Special Reference to Mandatory Retirement Policy* (1977), Committee Print, 95th Cong., 1st Sess., pp. 8-13. See also: *Mandatory Retirement: The Social and Human Cost of Enforced Idleness* (1977), 95th Cong., 1st Sess., pp. 15-20 and p. 38: "from the evidence presented, the committee concludes that 'age' should be as protected a classification as race and sex. . .If mandatory retirement because of age. . .is not to be declared unconstitutional by the Courts, then Congress should act to make such a practice illegal."

> The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress, to prohibit every discrimination between groups of people.

400 U.S. at 126-127.

Here, as in *Oregon v. Mitchell, supra,* the issue is not who is denied equal protection, but rather, which political body, state or federal, is empowered to fix the maximum age of game wardens. *Id.*, n.10. There is "no reason a priori to prefer [the perspectives and values] of the national figures, whose collective decision, applying nationwide, is necessarily less able to take account of peculiar local conditions." *Id.*, at 207-208 (Opinion of Harlan, J.).

The second holding of *Oregon v. Mitchell, supra,* announced by Justice Black, and joined by Justices Harlan, Stewart, Blackmun, and Chief Justice Burger, was that Congress had not the power under the Enforcement Clause of the Fourteenth Amendment to lower the voting age in state elections. Even recognizing that the right to vote is fundamental,[25] Congress could not, by statute, set age standards applicable to the states in state elections. This Court has never recognized the right of any individual to a particular government job as *per se* fundamental. *Massachusetts Board of Retirement v. Murgia, supra; San Antonio School District v. Rodriquez,* 411 U.S. 1 (1973); *Lindsey v. Normet,* 405 U.S. 56 (1972); *Dandridge v. Williams,* 397 U.S. 471 (1970).

If the Congress cannot regulate age standards set by the states in matters concerning fundamental rights under the Fourteenth Amendment, the case for allow-

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[25] See, eg. *Reynolds v. Sims,* 377 U.S. 533 (1964).

ing Congress to regulate age standards under the Fourteenth Amendment where no such fundamental right is concerned is weak, indeed.

In *Oregon v. Mitchell, supra,* Justice Black found three limits on Congress' authority to legislate pursuant to the Enforcement Clause of the Fourteenth Amendment:

> First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.'

Id., at 128.

The ADEA as applied in this case "repeals" the Tenth Amendment by usurping the power of the states to set reasonable qualifications for their own employees and strips the states of their power to govern themselves.

Because age was never intended to be a classification included within the Equal Protection Clause and is dissimilar to discrimination based upon race, color, religion, sex, or national origin, the ADEA does not "enforce" the provisions of the Fourteenth Amendment. Moreover, since the ADEA itself discriminates on the basis of age, to the extent that age may be deemed a classification within the ambit of the Equal Protection Clause, the ADEA is not "appropriate legislation."

Therefore, even if a Section 5 power base is implied to support the extension of ADEA to the states, that power is insufficient to reach them in this regulatory fashion.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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Supplemental Brief

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IN THE

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OCTOBER TERM, 1982

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APPELLANT,
v.
STATE OF WYOMING, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

SUPPLEMENTAL BRIEF FOR STATE OF WYOMING, ET AL.

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OCTOBER TERM, 1982

No. 81-554

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
APPELLANT,
v.
STATE OF WYOMING, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF WYOMING

SUPPLEMENTAL BRIEF FOR STATE OF WYOMING, ET AL.

The above-captioned case presents the question whether Congress may, consistent with the principles of state sovereignty guaranteed by the Tenth Amendment, enact legislation which preempts the State of Wyoming's decision to adopt a mandatory retirement age of 55 for its State Highway Patrolmen and its Game and Fish Wardens. In our brief on the merits, we explained that application of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.* ("ADEA"), which bars any mandatory retirement age lower than 70, directly impairs Wyoming's ability "to structure integral operations in areas of traditional government functions." *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

Since we filed our Appellees' brief, the Court decided an additional case applying the principles of the Tenth Amendment. Pursuant to Rule 35.5 of the rules of this Court, we submit a supplemental brief in order to address the applicability of the Court's analysis in *F.E.R.C. v., Mississippi*, 102 S.Ct. 2126 (1982).

In that case, the State of Mississippi contended that certain provisions of the Public Utilities Regulatory Policies Act of 1978 impermissibly infringes upon state sovereignty in violation of the Tenth Amendment. The portions of the Act attacked by the state required state utility commissions: (1) to consider, by the use of designated procedures, the adoption of certain federal regulatory standards; and (2) to enforce F.E.R.C. rules designed to encourage co-generation in small power production.

In rejecting the State's contention, the Court was careful to note that:

> We hold only that Congress may impose conditions on the State's regulation of private conduct in a pre-emptible area.

102 S.Ct. at 2143, n. 32.

The federal regulation challenged by Mississippi was, thus, theoretically indistinguishable from the Court's earlier holding in *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981), in which the Court upheld the Congress' power to regulate private businesses "in a manner that displaces the states' exercise of their police powers." 102 S.Ct. 2141, quoting *Hodel v. Virginia Surface Mining and Reclamation Association, supra*, 452 U.S. at 291. But the Court in *F.E.R.C. v. Mississippi, supra*, emphasized that its holding would not:

> . . .foreclose a Tenth Amendment challenge to federal interference with the State's ability 'to structure employer-employee relationships,' while providing 'those governmental services which [its] citizens require.'

102 S.Ct. 2143, n. 32, quoting *National League of Cities v. Usery, supra*, 426 U.S. at 851, 847.

F.E.R.C. v. Mississippi, supra, is inapplicable here precisely because this case does involve the ability of the State of Wyoming to "structure employer-employee relationships" for the provision of services that its citizens require. The EEOC is not attempting to regulate private businesses. Rather, the application of the ADEA to the State of Wyoming directly displaces the State's ability to provide police services most effectively. The effect of the EEOC action would be to take away from the State of Wyoming the authority to determine that its citizens would be best protected from crime by the employment of police officers who are age 55 or younger. Thus, the ADEA, like the statute held to be unconstitutional in *National League of Cities v. Usery, supra*, would:

> . . .significantly alter or displace the State's abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation.

426 U.S. at 851.

Respectfully submitted,

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REPLY MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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Our argument is fully made in our principal brief. We add further comment here only on the contention of the appellee and various amici that the Court is precluded from consideration of congressional power under Section 5 of the Fourteenth Amendment because of the failure of Congress to specify that it was exercising that power in extending the Age Discrimination in Employment Act to public employers in 1974. As we have shown (Br. 23-27), that contention is factually erroneous because Congress did sufficiently indicate its intent to draw upon that power, as well as the commerce power, in enacting the 1974 extension.[1]

---

[1]Of course, in formulating the pertinent legislative history Congress did not at that time have the guidance of this Court's opinion in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1 (1981).

Indeed, the court of appeals for the Seventh Circuit recently so concluded (slip op. 6-7) in upholding the constitutionality of the extension as appropriate legislation under Section 5. *EEOC* v. *County of Calumet*, No. 81-2120 (Aug. 20, 1982).

More fundamentally, however, we disagree with the legal premise of appellee's contention. We have shown (Br. 22) that Congress is not constitutionally required to generate legislative history in order to enact valid legislation. Where legislative history does exist, it is properly considered by the courts as a guide to congressional intent--*i.e.*, as an indication of the result Congress wished to achieve. But the legislative history of an enactment is not itself the subject of judicial review, in the sense that courts seek to ascertain the adequacy of Congress' knowledge about constitutional law. The determination whether the congressional objective is constitutional is for the courts. There is no constitutional requirement that for its statutes to survive, Congress must identify not only its intended substantive result, but also the best argument that the result is constitutional. The purpose of judicial review under our constitutional system is not to enable the courts to take issue with the constitutional theories specified by the political branches in exercising their powers, as if to award passing or failing grades to students on a constitutional law examination. It is instead to ascertain whether the coordinate branches of the government have acted within their constitutional powers, when their action has affected the rights of parties to a lawsuit. The absence of legislative history does not render a statute any less valid. It would seem equally obvious that if Congress elects to provide legislative history for the purpose of clarifying substantive meaning, Congress is not required to place its statute at constitutional risk as the price for such clarification.

These basic principles should not be obscured by the happenstance that when Congress exercises the spending power, there is often substantial overlap between inquiry into the result Congress wished to achieve and the question of the constitutional authority it intended to exercise. In that context it is crucial to ascertain whether Congress intended to impose an unconditional rule of conduct pursuant to its regulatory powers or whether it merely intended to require those who elect to participate in the federal program to conform their conduct to the conditions imposed upon recipients of federal funds. That is the teaching of *Pennhurst, supra* (see Br. at 22, n.11).

Here, however, there can be no doubt of the result Congress sought to achieve. It is equally clear that it had the power to do what it intended to do. Whether it correctly identified the constitutional source of that power is irrelevant.

For these reasons and those stated in our principal brief, the judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE
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Amicus Brief

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AS AMICI CURIAE IN SUPPORT OF THE BRIEF OF APPELLEES

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

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Appellees

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INTEREST OF AMICI CURIAE

The states, as well as the territory of Guam, appearing as *amici curiae* in support of appellees all have an interest in statutes that mandatorily require retirement of law enforcement personnel before age 70. (See Appendix B.) Many of the *amici* states are currently parties in litigation in various lower federal courts wherein issues substantially similar to those presented in this case are involved. (See Appendix A.) The validity of the mandatory retirement statutes of all the *amici* states will be directly

affected by the decision in this case.

A decision adverse to appellees will not only impugn the sovereighty of the *amici* states but will also directly impair their ability to structure and deliver law enforcement services to their citizens. Moreover, such a decision will force the *amici* states to incur substantial additional expenses associated with employee benefits.

SUMMARY OF ARGUMENT

This case resulted from the compulsory retirement at age 55 pursuant to §31-3-101 *et seq.*, W.S. 1977, of Bill Crump, a Wyoming Game and Fish Warden. (See Jurisdictional Statement, Appendix D, p. 19a). Mr. Crump subsequently filed a charge of unlawful age discrimination with the Equal Employment Opportunity Commission which brought suit against the State of Wyoming. On motion to dismiss, the District Court ruled (1) that the Age Discrimination in Employment Act of 1967 (ADEA) was enacted pursuant to the exercise of Congressional authority under the Commerce Clause and (2) that under this Court's holding in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the ADEA is unconstitutional in its application to the states. *E.E.O.C. v. Wyoming*, 514 F.Supp 595 (D.Wy. 1981).

The holding of the Court below should be affirmed because prior decisions of this Court compelled the result reached by that court. The legislative history of the ADEA indicates very substantial similarities to the Fair Labor Standards Act (FLSA) of 1938, an enactment indisputably based upon Congressional commerce power. *United States v. Darby*, 312 U.S. 100 (1941). Congress even used the same vehicle, P.L. 93-259, for amending the FLSA to extend its application to states in 1974, which was struck down in *N'atl League of Cities v. Usery*, 426 U.S. 833 (1976), as it used to amend the ADEA to extend its application to states. In its statement of findings, Congress expressly stated that age discrimination in industries affecting commerce burdens commerce and the free flow of goods in commerce. The use of this language indicates intent to exercise Con-

gressional commerce power. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943). Furthermore, under this Court's rule announced in *Pennhurst State School and Hospital v. Halderman*, 101 S.Ct. 1531 (1981), absent an expressly stated intent or conclusive basis for determining Congressional intent to act pursuant to Section 5 of the Fourteenth Amendment, such intent is not to be inferred. Therefore, Congress enacted the ADEA pursuant to the exercise of its power under the Commerce Clause.

The fact that the ADEA is not appropriate legislation to enforce the provisions of the Fourteenth Amendment is further reason to conclude that the ADEA is a Commerce Clause enactment. Section 5 of the Fourteenth Amendment grants Congress the authority to enforce its provisions but only "by appropriate legislation." *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). Because the ADEA only protects individuals between the ages of 40 and 70 from age discrimination, it implicitly authorizes states' discrimination on the basis of age against all others. Assuming *arguendo* that age discrimination is prohibited by the Equal Protection Clause, Congress cannot seek to enforce that protection through legislation authorizing violations of the rights of individuals outside the protected class. *Katzenbach v. Morgan*, 384 U.S. 641, 651 n. 10 (1966).

Congress' power under the Commerce Clause cannot support extension of the ADEA to the states because (1) the act regulates the states as states, (2) the act addresses matters which are indisputably attributes of state sovereignty, and (3) compliance with the act directly impairs states' ability to structure integral operations in areas of traditional state functions, in this case, local law enforcement. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976); *Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc.*, 101 S.Ct. 1531 (1981). There is no supervening national interest in requiring states to continue law enforcement personnel on the payrolls until age 70. Therefore, the extension of the ADEA to states is unconstitutional.

ARGUMENT

I.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 WAS ENACTED PURSUANT TO CONGRESS' AUTHORITY UNDER THE COMMERCE CLAUSE AND NOT PURSUANT TO ITS POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

The striking similarities between the ADEA and the FLSA indicate the Commerce Clause was the source of Congress' authority when it enacted the ADEA in 1967 and subsequently amended it in 1974. Relying on *Maryland v. Wirtz*, 392 U.S. 183 (1968), Congress, in 1974, by using the same public law, amended both the ADEA and the FLSA to extend the two acts' coverage to the states. Fair Labor Standards Amendments of 1974, Pub. L. 93-259, 88 Stat. 55. This Court ruled that Congress could not constitutionally extend the FLSA to the states through reliance on the commerce power. *National League of Cities v. Usery*, 426 U.S. 833 (1976). The issue was not whether the states' payment of wages below the limits set in the FLSA was an attribute of state sovereignty but whether the commerce power could support the extension of the FLSA to the states. The Court held, in effect, that because there was no federal interest in regulating the wages and hours of state employees, the legislation must fail. For the same reasons, the extension of the ADEA to the states must fail. Because there is no express statement of Congressional intent to enforce the Fourteenth Amendment, courts should not seek to sustain the ADEA as legislation meant to guarantee equal protection.

A. Legislative History Clearly Shows ADEA Enacted Pursuant to Power Under Commerce Clause

The ADEA contains a statement of legislative findings which provides as follows:

> (a) The Congress hereby finds and declares that —
>
> * * * *
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. §621(a)(4) (1976).

In Section 11(h) of the ADEA, 29 U.S.C. §630(h), is found the following definition of the terms "industry affecting commerce" as used in the act:

> The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959. [29 U.S.C. §402(c)].

The LMRDA definition restates the ADEA definition and refers to the Labor Management Relations Act of 1947, as amended, for further clarification. In *Usery v. Manchester East Catholic Reg. School Bd.*, 430 F. Supp. 188 (D.N.H. 1977), the Court traced the same definitional section of the ADEA. The Court stated:

> The term "commerce" in LMRA is defined as being the same as that word's meaning in the National Labor Relations Act (NLRA). 29 U.S.C. §152(6). The term "affecting commerce" is defined at Section 152(7).
>
> In NLRA, the term "commerce" is defined broadly and has been repeatedly interpreted to extend to the whole range of congressional authority under the Commerce Clause.

Id. at 190 (citations omitted). Congress stated that:

> The term "affecting commerce" means in commerce, or burdening commerce or obstructing com-

> merce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce of the free flow of commerce.

29 U.S.C. §152(7). The inclusion by reference in the ADEA of definitions which are inherently related and intertwined with Congress' power under the Commerce Clause demonstrates Congressional intent to exercise that power.

In *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943), this Court held that when Congress exercises the full extent of its Commerce Clause power, it uses the words "affecting commerce" in provisions determining the extent of the Act's applicability. The use of the "affecting commerce" language signals Congressional intent to exercise the full extent of Congress' Commerce Clause power. *Usery v. Manchester East Catholic Reg. School Bd.*, 430 F.Supp. 188 (D.N.H. 1977).

The ADEA, as originally enacted in 1967, did not apply to the United States or a state or political subdivision thereof by virtue of an exclusion from the definition of "employer" as used in the act. ADEA §11(b), 81 Stat. 602, 605 (*current version at* 29 U.S.C. §630(b) (1976)). However, in 1974, the ADEA was amended by Public Law 93-259, Section 28, which was entitled "Fair Labor Standards Amendments of 1974." 88 Stat. 55.

The introductory statement accompanying P.L. 93-259 contains the following language from the original FLSA of 1938:

> Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of labor conditions detrimental to the maintenance of minimum standards of living necessary for health, efficiency and general well being of workers... .[1]

In *United States v. Darby*, 312 U.S. 100 (1941), the Court unanimously upheld the FLSA of 1938 as a valid exercise of Congressional authority under the commerce power.

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[1]H.R. Rep. No. 913, 93d Cong., 2nd Sess. 1, *reprinted in* [1974] U.S. Code Cong. & Ad. News 2811.

> Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.

Id. at 115.

In House Report 93-913[2], the purpose of Public Law 93-259 is stated as follows:

> to implement the policy of the Act by (1) providing an increase in the minimum wage rate and (2) extending the benefits and protection of the Act to workers engaged in commerce or in the production of goods for commerce or employed in enterprises engaged in commerce or in the production of goods for commerce.

The House Report further explains that the bill:

> extends the minimum wage and overtime coverage of the Act to Federal, State and local government employees.[3]

Because the FLSA of 1938 was enacted pursuant to the power of Congress under the Commerce Clause, it is clear that in amending the FLSA in 1974, Congress enacted Public Law 93-259 pursuant to the same constitutional grant of authority, the Commerce Clause. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

In Section 28 of the FLS Amendments of 1974, Public Law 93-259, 88 Stat. 74, is found language amending the ADEA of 1967. The amendments (1) lower to twenty the maximum number of employees that an exempt employer may employ, and (2) expand the coverage of the Act to federal, state and local government employees by removing the exclusion of said entities from the definitions of "employer" and "employment agency." *See*, 29 U.S.C. §630 (b) and (c). With respect to Section 28, the committee report states:

---

[2]*Id.* at 2812.

[3]*Id.*

> The amendment is a logical extension of the committee's decision to extend FLSA coverage to Federal, State and local government employees.[4]

Thus, the inclusion of the amendment to the ADEA within the FLS Amendments of 1974, which was clearly enacted pursuant to Congressional authority under the Commerce Clause, demonstrates that the amendment to the ADEA, as well as the ADEA, and the FLS Amendments of 1974 are exercises of Congressional authority under the Commerce Clause.

In S. Rep. No. 723, 90th Cong. 1st Sess. 1, *reprinted in* [1967] U.S. Code Cong. & Ad. News 2213, the investigation and enforcement provisions of the ADEA are discussed. The report states that these provisions "essentially follow those of the Fair Labor Standards Act". *Id.* at 2218. The language of Section 7(b) of the ADEA, 29 U.S.C. §626(b), refers specifically to the "powers, remedies, and procedures" provided in the FLSA of 1938 as amended. Thus, there is further support for the proposition that the ADEA was fashioned after the FLSA and enacted pursuant to the same constitutional authority. When the responsibility for enforcement of the ADEA was subsequently transferred from the Wage & Hour Division of the Department of Labor to the EEOC by Executive Order, no change was made in the statutory enforcement scheme.[5] The enforcement scheme retained its original characteristics which follow the scheme of the FLSA.

In his letter of January 23, 1967, transmitting the ADEA to Congress on behalf of the Johnson administration, Labor Secretary Wirtz states in pertinent part:

> The prohibitions of the legislation would be directed to arbitrary discrimination by employers, employment agencies, and labor organizations in industries affecting commerce.

113 Cong. Rec. 1377. Nothing in the Secretary's transmittal

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[4] *Id.* at 2849.

[5] 124 Cong. Rec. 54451 (Remarks of Sen. Williams).

letter indicates an attempt through legislation to enforce the Fourteenth Amendment's protection of individual rights. In fact, it is difficult to discern why the Secretary of Labor is designated to enforce the act and to issue regulations for its implementation if its ascribed purpose is protection and enforcement of basic civil rights guarantees contained in the Fourteenth Amendment. *But see*, 1978 Reorg. Plan No. 1, 43 Fed. Reg. 19807, 92 Stat. 3781.

The most logical perspective from which to assess the source of Congressional authority in enacting Section 28 of P.L. 93-259, 88 Stat. 74, is to analyze what Congress thought it could do in 1974. In *Maryland v. Wirtz*, 392 U.S. 183 (1968), this Court specifically upheld Congress' use of the commerce power to extend coverage of the FLSA to state-operated schools and hospitals. In House Report 93-913[6] accompanying P.L. 93-259, the Committee specifically referred to this Court's holding in *Maryland v. Wirtz* as support for further extension of the FLSA to federal, state and local government employees.[7] In the same report, the Committee explained that the amendment to the ADEA "is a logical extension of the committee's decision to extend FLSA coverage to Federal, State and local government employees."[8] Thus, in 1974, *Maryland v. Wirtz* provided a reasonable ground for Congress' belief, as expressly stated in its own committee report, that it possessed the requisite authority under the Commerce Clause to extend coverage of the ADEA to the states.[9]

B. Judicial History Analyzed Clearly Shows ADEA Enacted Pursuant to Power Under Commerce Clause

Until 1976, no one questioned that the ADEA was

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[6]H.R. Rep. No. 913, 93d Cong., 2nd Sess. 1, *reprinted in* [1974] U.S. Code Cong. & Ad. News 2811.

[7]*Id.* at 2816.

[8]*Id.* at 2849.

[9]*Id.* at 2817. Specifically, the committee stated: "The commerce power provides a constitutional basis for extension of the Act to State-operated schools and hospitals."

enacted pursuant to Congress' commerce power. That conclusion seemed clear from the statutory language and legislative history. In 1976, as a result of this Court's decision in *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), questions were raised regarding the source of Congress' authority when it amended the ADEA in 1974. In that case, this Court held that the 1974 amendments to the FLSA extending that act's coverage to the states (the same enactment which extended the ADEA's coverage to the states) unconstitutionally infringed upon the fundamental rights reserved to the states under our federal system of government by the Tenth Amendment to the U.S. Constitution which states: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This Court stated:

> We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, §8, Cl. 3 [the Commerce Clause].

426 U.S. at 852.[10]

In so holding, however, this Court left open the question of whether a Tenth Amendment challenge would succeed against Congressional enactments empowered by sources other than the commerce power, such as, for example, section 5 of the Fourteenth Amendment. 426 U.S. at 852 n. 17. The answer was suggested in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), decided the following week, wherein this Court ruled that the principle of state sovereignty was no bar to the congressional exercise of power under section 5 of the Fourteenth Amendment in extending coverage of Title VII of the Civil Rights Act to the states.[11]

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[10]The 1974 Amendments to the ADEA came after *Wirtz* but before *National League of Cities*.

[11]*Id.* at 453 n. 9. The Court noted specifically that there was:

> no dispute that in enacting the 1972 amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment.

Thus, an enactment based on the commerce power was more vulnerable to a Tenth Amendment challenge than one based on section 5 of the Fourteenth Amendment, prompting some courts, understandably reluctant to strike down an act of Congress, to search for a Congressional intent to exercise enforcement power under the Fourteenth Amendment in order to uphold legislation. There is now conflict among the lower courts as to whether the ADEA was enacted by Congress pursuant to its authority under Section 5 of the Fourteenth Amendment or the Commerce Clause.[12]

Specifically, when faced with a constitutional challenge to the ADEA's 1974 amendment regarding the Act's application to a municipal corporation, the Fourth Circuit reached the then-novel conclusion that the ADEA was enacted, not pursuant to the Commerce Clause, but rather pursuant to Section 5 of the Fourteenth Amendment. *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977). The Fourth Circuit stated:

> [a]fter considering the legislative history and the [Supreme] Court's opinion in *Fitzpatrick v. Bitzer* [citation omitted], we conclude that in enacting ADEA and in extending it to the states Congress exercised its powers under §5 of the Fourteenth Amendment.

567 F.2d 1270-71.

Interestingly, the Fourth Circuit's "consideration of the legislative history" was relegated to a footnote and

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[12]*See, Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977); *E.E.O.C. v. County of Calumet*, 519 F.Supp. 195 (E.D. Wis. 1981), *appeal docketed* No. 81-2120 (7th Cir. 1981); *E.E.O.C. v. Penn. Liquor Control Bd.*, 503 F.Supp. 1051 (M.D. Penn. 1980); *Marshall v. Delaware River and Bay Authority*, 471 F.Supp. 866, 891 n. 7 (D. Del. 1979); *Remmick v. Barnes County*, 435 F.Supp. 914 (D.N.D. 1977); *Aaron v. Davis*, 424 F.Supp. 1238, 1241 n. 2 (E.D. Ark. 1976); *Usery v. Bd. of Ed. of Salt Lake*, 421 F.Supp. 721 (D. Utah 1976); *but cf., E.E.O.C. v. Wyoming*, 514 F. Supp. 595 (D. Wy. 1981), *appeal docketed*, No. 81-554 (U.S. Sup. Ct. Sept. 17, 1981); *E.E.O.C. v. Louisiana*, No. 80-0282 (E.D. La. October 30, 1981) Morey, J.; *Taylor v. Department of Fish & Game of the State of Montana*, 523 F.Supp. 514 (D. Mont. 1981); *Morgan v. Dept of Offender Rehabilitation*, No. C81-2118A (N.D. Ga. Mar. 31, 1982).

conspicuously failed to mention the ADEA's express declaration and finding of a burden on commerce created by age discrimination or of the act's definition of employer as commerce-related.[13] Nor did the Court note the significant inter-relationship between the FLSA, an indisputably commerce power-based enactment, and the ADEA. Rather, the Fourth Circuit made vague reference to the fact that a "proposal by Senator Javits to include discrimination on account of age in Title VII of the Civil Rights Act of 1964 was rejected. . ." and that Title VII had been extended to cover the states as employers in 1972, in the same manner as was the ADEA in 1974. The Court reasoned that, because a proposal to include age discrimination in the Civil Rights Act, an act indisputably based upon Section 5 of the Fourteenth Amendment, was made and rejected, it followed then that the ADEA was similarly grounded in Congress' Fourteenth Amendment enforcement power.

Simply stated, this makes no sense. First, the only valid conclusion to be drawn from the rejection by Congress of the proposal to incorporate age discrimination in the Civil Rights Act is that the ADEA was *not* enacted pursuant to Congress' Fourteenth Amendment enforcement power. Of great importance is the fact that, when the amendments to the ADEA were enacted in 1974, Congress believed that it had authority under the Commerce Clause to extend its coverage to the states.[14]

Second, that Congress extended coverage of Title VII to the states in 1972 pursuant to its Fourteenth Amendment power has nothing to do with Congress' extension of coverage of the ADEA to the states in 1974. Far more illuminating is the fact, not even mentioned by the Fourth Circuit, that the *very same vehicle*, P.L. 93-259, by which Congress extended coverage to the states of the FLSA, an indisputably commerce power-based enactment, was used by Congress to extend coverage to the states of the ADEA. To reach any conclusion but that the ADEA was enacted

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[13]567 F.2d at 1270-71 n. 11.

[14]See footnote 9 and accompanying text, *supra*.

pursuant to Congress' Commerce Clause power is to stretch the imagination and to find an intent which is simply not present. When Congress expresses its authority in such clear language as the references to "an industry affecting commerce," its intent to exercise its power under the Commerce Clause is indisputable. *See*, 29 U.S.C. §§ 621(a)(4), 630(b) & (d) (1976). *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943); *Usery v. Manchester East Catholic Reg. School Bd.*, 430 F. Supp. 188 (D.N.H. 1977).

The legislative history relied upon by some courts[15] which have found intent to exercise power under Section 5 of the Fourteenth Amendment consists of nothing more than Congressional references to the fact that age discrimination is the evil against which the ADEA is directed and that the ADEA and the Civil Rights Act have "close ties." For several reasons, however, these statements say absolutely nothing about the *power* of Congress to enact the ADEA.

First, the mere fact that the ADEA addresses itself to discriminatory practices by no means necessitates the conclusion that the Fourteenth Amendment power of Congress serves as its basis. In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the authority of Congress under the Commerce Clause to enact Title II of the Civil Rights Act of 1964 which prohibits racial discrimination in places of public accomodation was upheld. In affirming the constitutionality of Title II, this Court noted the Congressional findings of a "substantial economic effect" on interstate commerce. *See*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding 42 U.S.C. § 2000a). Thus, the Commerce Clause is certainly no less plausible a basis for legislation aimed at remedying discrimination in private commerce than the Fourteenth Amendment.

Second, any "close ties" between the Civil Rights Act and the ADEA prove nothing in the face of Congress' rejection of the proposal to incorporate the ADEA into that act[16]

[15]See footnote 12, *supra*.

[16]*See*, S. Rep. No. 723, 90th Cong., 1st Sess., 13 (Nov. 4, 1967). (Individual views of Senator Javits). *See also*, p. 12, *supra*.

and the fact that Congress chose to amend the ADEA in 1974 through use of P.L. 93-259, the same vehicle used to amend the FLSA, a Commerce Clause enactment.

C. Courts Should Not Infer Unstated Congressional Intent to Enforce the Fourteenth Amendment

The practice of some courts[17] of "fishing" for a Fourteenth Amendment basis for an enactment where none is expressly stated by Congress has recently been discredited by this Court in *Pennhurst State School and Hospital v. Halderman*, 101 S.Ct. 1531 (1981). In that case, this Court ruled that a Fourteenth Amendment, Section 5, basis should not be assumed absent an express statement by Congress to that effect:

> Although this Court has previously addressed issues going to Congress' power to secure the guarantees of the Fourteenth Amendment, [citations omitted] *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), [footnote omitted] we have had little occasion to consider the appropriate test for determining when Congress intends to enforce those guarantees. Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment. Our previous cases are wholly consistent with that view, since Congress in those cases expressly articulated its intent to legislate pursuant to § 5.

101 S.Ct. at 1539. Thus, the Court refused to attribute to Congress an intent to pass the Developmentally Disabled Asssitance and Bill of Rights Act pursuant to its power under Section 5 of the Fourteenth Amendment where no such intent was revealed in the act's language, structure, or legislative history. In the absence of an "intent expressly

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[17]See footnote 12, *supra*.

stated" or "conclusive basis" for determining that Congress acted pursuant to Section 5, no such authority may be found.[18]

When the ADEA and its legislative history are read together, as required by *Pennhurst*, the conclusion is compelled that the ADEA was, in fact, based on the Commerce Clause power and not Congress' Fourteenth Amendment enforcement power. Even the less demanding *Pennhurst* "conclusive basis" test[19] simply cannot be met in the face of: the ADEA's commerce-related definitions; Congress' declaration of age discrimination creating a burden on commerce; the inter-relationship between the ADEA and the FLSA; Congress' rejection of the proposal to incorporate the 1974 ADEA amendments into Title VII of the Civil Rights Act; and the utter absence of any Congressional statement to the effect that its Fourteenth Amendment power was being utilized in enacting the ADEA.

II.

THE ADEA IS NOT APPROPRIATE LEGISLATION TO ENFORCE THE FOURTEENTH AMENDMENT.

Section 5 of the Fourteenth Amendment provides Congress with authority to enact appropriate legislation to enforce the protections guaranteed by the other sections of the amendment. If it can be shown that Congress could not

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[18]101 S.Ct. at 1548, (White, J., dissenting in part on another issue). While six Justices (Rehnquist, Burger, Stewart, Powell, Stevens and Blackmun) would require an explicit congressional statement of intent to invoke Fourteenth Amendment enforcement power, three Justices (White, Brennan and Marshall) would be satisfied with "a conclusive basis" for such a determination. That "conclusive basis" must be ascertained, according to the three, by examination of the statutory language, the structure of the act in question and its relationship to other acts as evidenced by cross-references stated in the act itself, and a combination of "all objective considerations" connected with the act. *Id.* The concurring Justices did not disapprove of the majority's "clearly stated intent" test, but merely seemed to consider it strongly along with other factors.

[19]See footnote 18, *supra.*

have enacted the ADEA pursuant to Section 5 of the Fourteenth Amendment, then there is further reason to conclude that the ADEA was enacted pursuant to the exercise of Congressional commerce power. This line of reasoning should not be construed as a challenge to the ADEA on Fourteenth Amendment grounds. What is intended through this argument is a demonstration that the ADEA is not appropriate legislation to enforce the provisions of the Fourteenth Amendment.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), this Court implicitly recognized the distinct possibility that Congress might enact legislation inappropriate to enforce the provisions of the Fourteenth Amendment. *Id.* at 456 n. 11. In such a case, the legislation could not be sustained on the basis of Section 5 of the Fourteenth Amendment. *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). The relevant inquiry then is (1) which provision(s), if any, of the Fourteenth Amendment did Congress intend to enforce through the ADEA, and (2) are the provisions of the ADEA appropriate to carry out that Congressional intent.

In *Massachusetts v. Murgia*, 427 U.S. 307 (1976), although no statutory challenge under the ADEA was made, this Court used traditional equal protection analysis to reject a constitutional challenge to state law mandating compulsory retirement at age 50 for law enforcement personnel. Thus, there may be some ground for concluding that age discrimination may be prohibited by the Fourteenth Amendment. Moreover, lower courts have decided that Congress intended, through the ADEA, to enforce the Equal Protection Clause.[20] *See, e.g., Arritt v. Grissell*, 567 F. 2d 1267 (4th Cir. 1977); *Usery v. Board of Education*, 421 F.Supp 718 (D. Utah 1976). *Cf. Usery v. Manchester East Catholic Reg. School Bd.*, 430 F.Supp. 188 (D.N.H. 1977) (coverage of ADEA coextensive with Commerce Clause). However, the ADEA is not appropriate legislation to enforce a Fourteenth Amendment prohibition against age

[20]U.S. Const. amend, XIV, Sec. 1 which states, in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."

discrimination, (if in fact such prohibition is contained in the Fourteenth Amendment) because it only protects individuals from age discrimination who are between the ages of 40 and 70. The ADEA, in effect, authorizes states to discriminate against their citizens on the basis of age if they are younger than 40 or older than 70. Congress cannot enact laws under its enforcement power contained in the Fourteenth Amendment which laws by their nature authorize violations of the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 n. 10 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Further illumination of Congressional intent in 1974 can be found in the Committee reports accompanying P.L. 93-350, 88 Stat. 355, which require law enforcement officers and firefighters in the *federal* service to retire at age 55. 5 U.S.C. §8335(b) (1976). This legislation, passed by the same Congress which amended the ADEA so as to proscribe mandatory retirement of state law enforcement personnel prior to age 70, lowered the mandatory retirement age for federal law enforcement officers and firefighters from age 70 to age 55. The committee report states:

> The history of retirement legislation dealing with law enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age 50. *This intent has been based on the nature of the determination that these occupations should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service.* They are occupations calling for the strength and stamina of the young rather than the middle aged. [Emphasis supplied.]

S. Rep. No. 93-948 , 93d Cong., 2d Sess. 1, *reprinted in* [1974] U.S. Code Cong. & Ad. News 3699. As stated by the Court in *Thomas v. U.S. Postal Inspection Service*, 647 F.2d 1035 (10th Cir. 1981), it is difficult to discern a supervening national interest justifying application of the federal regu-

lation in place of states' laws when the federal government is unwilling to follow its own dictates.

Therefore, the ADEA is not appropriate legislation to enforce the provisions of the Fourteenth Amendment. Congress enacted the ADEA pursuant to its power under the Commerce Clause.

III.

THE COMMERCE CLAUSE CANNOT SUPPORT THE EXTENSION OF THE ADEA TO THE STATES.

In *Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc.*, 101 S.Ct. 2352 (1981), this Court delineated the requirements for a successful challenge to Congressional commerce power legislation. Citing *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), this Court stated:

> First, there must be a showing that the challenged statute regulates the "States as States." . . . Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty."... And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." (Citations omitted.)

Hodel, 101 S.Ct. at 2366. The Court indicated in a footnote that even if these three requirements are met, under certain circumstances the nature of the federal interest may require submission by the states. *Hodel*, 101 S.Ct. 2352, 2366 n. 29 (1981); *See also, National League of Cities v. Usery*, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring).

Application of the requirements set out in *Hodel* to the case *sub judice* must focus on the last two requirements since there can be no doubt that the ADEA regulates the states as states. 29 U.S.C. § 630(b) and (c) (1976). It is the exclusive province of the states to regulate the employment terms and conditions of their own state employees. That is

precisely the point which this Court made in *Nat'l League of Cities v. Usery*. That the federal regulation struck down in *Nat'l League of Cities v. Usery* prescribed minimum wages and maximum hours whereas the federal regulation challenged below proscribes mandatory retirement on the basis of age prior to age 70 presents merely a difference in degree of federal intrusion and not a viable distinction between attributes of state sovereignty and permissible areas of federal regulation. The vitality of our dual system of government requires the maintenance of clear lines of distinction between what is national and what is local. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). The logic of the decision invalidating the application of the FLSA to the states compels the invalidation of the application of the ADEA to the states.

In order to comply with the ADEA, the states must either (1) prove that "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" in each case wherein mandatory retirement is challenged, 29 U.S.C. § 623(f)(1) (1976), or (2) forestall mandatory retirement of law enforcement personnel until age 70, when the protections of the ADEA cease, 29 U.S.C. § 631(a) (Supp. 1980). From the states' point of view, each alternative requires unnecessary consumption of scarce resources, unwarranted intrusion by the federal government into areas traditionally left to the states and usurpation of law enforcement personnel policy perogatives arbitrarily deemed unacceptable by Congress.

Significant reallocation of state resources brought about by application of the ADEA to the states appears in the area of employee benefits. Law enforcement personnel are often subject to statutes defining certain occupational diseases which, if contraction results in death or disability, entitle the employee to stated benefits in the form of financial compensation. *See, e.g.*, §§36-30-20 through 36-30-23, *Code of Alabama* 1975. Studies have shown that increases in age correlate positively with increases in the frequency as well as the duration of health insurance claims.[21] Thus,

[21]Houghton & Wolf, *Development of the 1974 Medical Expense Tables*, 30 Transactions, Society of Actuaries 9 (1978); Committee on Expe-

as a matter of actuarial fact, states' liability for spiraling benefits costs increases as a result of forced retention of older law enforcement personnel.

Recognizing the need for comparatively young, strong and vigorous personnel in law enforcement positions, the various retirement plans adopted by states call for compulsory retirement of law enforcement officers at ages ranging from 55 to 65.[22] Under the ADEA, however, the states are prohibited from retiring any law enforcement officers until they reach age 70. This represents an even more serious intrusion into the states' integral governmental functions than was at issue in *Nat'l League of Cities*, since the delivery of adequate police protection is perhaps the quintessential "traditional governmental function" reserved to the states.

Because of the provisions of the ADEA, the states are required to maintain their law enforcement personnel on their payrolls for an additional five to fifteen years, thereby restricting, or delaying by five to fifteen years, the upward mobility of the less senior law enforcement employees, who would otherwise have moved into the more senior, vacated positions. The natural effect of such restricted upward movement is an increase in the number of years which the less senior law enforcement employees must remain in the less senior positions, thereby raising the average age of law officers throughout all employment levels of the states' police forces. Moreover, the resultant decrease in the number of available entry level positions severely curtails the ability of states' police forces to attract qualified candidates and to pursue affirmative action programs. It goes without saying that the costs of this federally-imposed burden are staggering at a time when the states can least afford such a drain on their scarce resources in light of decreased federal funding for states in other areas. Of course, the adverse

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rience under Individual Health Insurance, 1979 *Report*, Transactions, Society of Actuaries, 235-289 (1980).

[22]Twenty-eight states have enacted laws requiring compulsory retirement of law enforcement officers prior to age 70. See appendix B.

effects which compliance with the ADEA would visit upon the states are, in turn, suffered by the citizens who must depend on the states for adequate police protection.

Finally, there is no supervening federal interest in compelling the states to maintain their law enforcement personnel on their payrolls until age 70. The same policy considerations which justify mandatory retirement of federal law enforcement personnel at age 55 apply at the states' level. The imposition of arbitrary federal standards on state governments from which standards the federal government is exempt cannot be tolerated in our dual system of government if any distinction is to be maintained between national and state government. The result reached in *National League of Cities v. Usery*, did not indicate that violation of the standards of the FLSA was an attribute of state sovereignty. The rationale for the decision was that the federal interest in the state employer-employee relationship was insufficient to support Commerce Clause legislation regulating that relationship. Thus, appellant's claim that arbitrary age discrimination is not an attribute of state sovereignty must fail.

CONCLUSION

Congress exceeded its authority under the Commerce Clause when it enacted Section 28 of P.L. 93-259 extending the application of the ADEA to the states. The *amici curiae* states support the State of Wyoming in urging this Court to affirm the opinion of the District Court below.

Respectfully submitted,

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APPENDIX A

Adams v. James,
526 F.Supp. 80 (M.D. Ala. 1981), *appeal docketed*
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Bacon v. Missouri Dept. of Mental Health,
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Bleakley v. Jekyll Island, State Park Auth.,
No. CV281-20 (S.D. Ga.)

E.E.O.C. v. County of Allegheny,
519 F.Supp. 1328 (W.D. Pa. 1981), *appeal docketed*
No. 81-2530 (3d Cir. Aug. 25, 1981)

E.E.O.C. v. State of Michigan Dept of State Police, No. G81-480 CA 1 (W.D. Mich.)

E.E.O.C. v. State of Missouri Dept. of Mental Health,
No. 81-123-CV-C-W (W.D. Mo.)

E.E.O.C. v. Tennessee, Wildlife Resources Agency,
No. 81-3461 (M.D. Tenn.)

Hoefelman v. Conservation Commission of Missouri,
No. 82-4015-CV-C-5 (W.D. Mo.)

Lobdell v. State of Michigan, viz. Michigan State Police, No. M81-74 CA (W.D. Mich.)

Price v. Whitmer, No. 81-4135-CV-C-W (W.D. Mo.)

Renew v. Jekyll Island, State Park Auth.,
No. CV279-142 (S.D. Ga.), *appeal docketed*
No. 81-7104 (5th Cir. 1981)

Rooker v. State of Michigan, viz., Michigan State Police, No. G80-336 CA 5 (W.D. Mich.)

Turner v. State of Michigan, viz. Michigan State Police, No. M81-74 CA (W.D. Mich.)

APPENDIX B

STATE	CITATION	RETIREMENT AGE
Alabama	§36-27-16(a)(1)(e)	60
Alaska	None	
Arizona	Ariz. Rev. Stat. Ann. §38-759 (1974)	70
Arkansas	Ark. Stat. Ann. §42-455 (1977) Ark. Stat. Ann. §§12-3501 to 12-3505 (1979)	65 (St. Police) 70
California	Cal. GOV Code §20980 (West 1980)	60 (police)
	Cal. GOV Code §20981 (West 1980)	70
Colorado	None	
Connecticut	None	
Delaware	Del. Code Ann. tit. 11, §8323 (1974)	55 (police)
	Del. Code Ann. tit. 29, §5521 (1974)	70
Florida	None	
Georgia	Ga. Code Ann. §40-2505 (1975)	70
Hawaii	Hawaii Rev. Stat. §78-3 (1976) Hawaii Rev. Stat. §88-73 (1976)	70
Idaho	Idaho Code §50-1514 (1948)	65 (police)
Illinois	Ill. Ann. Stat. ch. 24, §10-2.1-17 (Smith-Hurd 1964) and Ill. Ann. Stat. ch. 24, §10-1-18 (Smith-Hurd 1964)	65 63 (police)

Indiana	Ind. Code. Ann. §36-8-3.5-20 (West 1979)	65 (police)
Iowa	Iowa Code Ann. §§97B.45, 97B.46 (West 1950)	65 (police)
Kansas	Kan. Stat. Ann. §74-4975 (1980)	60 (police)
Kentucky	None	
Louisiana	La. Rev. Stat. Ann. §42.691 (West 1965)	65 (police)
Maine	None	
Maryland	Md. Ann. Code Art. 88B, §31 (1978)	60 (police)
Massachusetts	Mass. Gen. Laws Ann. ch. 32, §§1, 3 (West 1966)	65 (police)
Michigan	Mich. Comp. Laws §38.19 (1978)	70
	Mich. Comp. Laws §38.556 (1978)	65 (police)
Minnesota	Minn. Stat. Ann. §423.075 (West 1970)	65 (police)
Mississippi	Miss Code Ann. §21-29-3 (1981)	70 (police)
Missouri	Mo. Ann. Stat. §104.080 (Vernon 1969)	65 (H.P.)
	Mo. Ann. Stat. §104.380 (Vernon 1969)	70
Montana	Mont. Code Ann. §19-6-504 (1981)	60 (H.P.)
	Mont. Code Ann. §19-7-501 (1981)	65 (sheriff)
	Mont. Code Ann. §19-9-801 (1981)	65 (police)

Nebraska	Neb. Rev. Stat. §84-1317 (1980)	70
Nevada	None	
New Hampshire	None	
New Jersey	N.J. Rev. Stat. §55.5A-8 (1966)	55
New Mexico	None	
New York	N.Y. Ret. & Soc. Sec. Law §381-6 (McKinney 1972)	55 (police)
	N.Y. Ret. & Soc. Sec. Law §70 (McKinney 1972)	70
North Carolina	N.C. Gen. Stat. §135-5 (1981)	70
North Dakota	N.D. Cent. Code §39-03.1-18 (1960)	60 (H.P.)
Ohio	Ohio Rev. Code Ann. §5506.16 (Baldwin 1980)	55 (H.P.)
Oklahoma	Okla. Stat. Ann. tit. 47, §2-305 (West 1963)	60 (H.P.)
Oregon	Or. Rev. Stat. §237.19 (1981)	60
Pennsylvania	None	
Rhode Island	R.I. Gen. Laws §36-10-9 (1956)	70
South Carolina	S.C. Code Ann. §9-1-1530 (Law. Co-op. 1976)	70
South Dakota	S.D. Codified Laws Ann. §3-6A-36.1 (1980)	70
Tennessee	Tenn. Code Ann. §8-36-205 (1980)	60 (police)

Texas	None	
Utah	None	
Vermont	Vt. Stat. Ann. tit. 3, §459 (1972)	70 55 (police)
Virginia	Va. Code §51-111.54 (1950)	70
Washington	Wash. Rev. Code Ann. §43.43.250 (1970)	65 (H.P.)
	Wash. Rev. Code Ann. 41.40.180 (1970)	70
West Virginia	W. Va. Code §8-22-25 (1976)	65 (police)
Wisconsin	Wis. Stat. Ann. §41.11 (West 1971)	65
	Wis. Stat. Ann. §41.02 (23) (West 1971)	55 (police)
Wyoming	Wyo. Stat. §31-3-107 (1977)	65 (H.P.)
	Wyo. Stat. §15-5-307 (1977)	60 (police)
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Amicus Brief

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Supreme Court, U.S.
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No. 81-554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant

v.

STATE OF WYOMING, ET AL.,
Appellees

On Appeal from the United States District Court for the District of Wyoming

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BRIEF AMICUS CURIAE OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant

v.

STATE OF WYOMING, ET AL.,
Appellees

On Appeal from the United States District Court for the District of Wyoming

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BRIEF AMICUS CURIAE OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

INTEREST OF AMICUS

The American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) is the largest union of public employees in the country, representing approximately one million members who are employed in state and local governments throughout the nation. AFSCME has long taken the position that all employment decisions should be based on individual merit. As Congress found when first considering the Age Discrim-

ination in Employment Act in 1967, and again in amending it in 1978, forced retirement policies are not based on the abilities of individual workers, but derive from outmoded stereotypes concerning older Americans.

Congress has also recognized that mandatory retirement causes significant harm to older workers, in addition to public injuries caused by the substantial loss in productivity when the most skilled and experienced workers are prematurely retired. For example, mandatory retirement often results in serious financial hardship for families dependent upon the income of the retired worker, who is usually unable to find new employment. H. Rep. No. 95-527, Pt. 1, 95th Cong., 1st Sess. 2 (1978). Arbitrary age-based discharge also has been found to result in a substantially higher than expected death rate in the third or fourth years after mandatory retirement, due to its adverse effect on the psychological and physical well being of the employee. *Ibid.* And, early mandatory retirement especially works to the disadvantage of newer entrants into the workforce, such as women and minorities subjected to earlier discrimination, and women who chose to devote early potential working years to child rearing, since these new entrants may not have accumulated significant retirement benefits by the time they reach the required retirement age. Hearings on S. 1784, Subcommittee on Labor, Senate Committee on Human Resources, 95th Cong., 1st Sess. 53 (1977). Most importantly, the compelled idleness of capable, willing, experienced and productive individuals is simply unfair.

The decision in this case will affect the right of AFSCME members and other public employees to continue working, if able, until age 70. Until the application of the Age Discrimination in Employment Act to state and local governments in 1974, numerous public employers forced able civil servants to retire before age 65. An even greater number of public employers forced workers to retire before reaching age 70 prior to the

extension of the Act's coverage to workers up to age 70 in 1978. An affirmance of the decision below might well induce some of those public employers to revert to the archaic retirement policies previously used if they are freed of the Act's constraints.

CONSENT OF THE PARTIES

This brief *amicus curiae* in support of appellant is filed with the consent of both parties.

SUMMARY OF ARGUMENT

A.

Under numerous precedents of this Court, Congress was not required to specify the source of its authority when extending the coverage of the Age Discrimination in Employment Act (ADEA) to state and local governments. The District Court incorrectly relied on the decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), as requiring Congress to state expressly that its enforcement power under § 5 of the Fourteenth Amendment was a basis for ADEA. *Pennhurst* only requires a clear statement of the source of authority when there is a doubt as to whether Congress intends to impose mandatory duties on state and local governments. In ADEA Congress clearly intended to impose such requirements and the only question in the case is its power to do so. In any event, the legislative history of the 1974 extension of ADEA to state and local governments, and the 1978 amendments pertaining to mandatory retirement, contain substantial evidence of Congress' intent to rely on § 5 as one source of its authority to apply ADEA to state and local governments.

B.

ADEA is "appropriate" legislation to enforce the Fourteenth Amendment, since it is "plainly adapted" to securing to older workers the guarantees of that Amend-

ment against arbitrary discrimination. Under § 5, Congress may enact legislation that provides a remedy for violations of the Fourteenth Amendment or that prohibits state action posing a risk of unconstitutional action. As applied to mandatory retirement provisions, ADEA does both.

In enacting ADEA, and in amending it in 1978, Congress conducted thorough investigations of the problem of age discrimination, and found that in most cases employers were basing mandatory retirement and other employment decisions on stereotypic, false assumptions about the lack of ability of older workers to perform competently in their jobs. Congress found that, contrary to the assumptions of many employers, older workers perform as well or better, use better judgment, are absent less often, and have fewer accidents, than younger workers. Congress also found that objective methods of evaluating employee performance on a case-by-case basis were available and were in fact already used by employers throughout the country to evaluate younger workers.

ADEA is a carefully tailored remedial response to the problems of age discrimination encountered by Congress in its investigation. It assures that stereotypes, and hence factually inaccurate and arbitrary distinctions, will not control employer decisions, and that age will be a permissible factor to distinguish employees only where it is a bona fide job qualification reasonably needed in the employer's business. In providing a basis for distinguishing between rational and irrational uses of age as an employment criterion, and in providing for damages, injunctive and equitable relief against the latter, ADEA represents a straightforward legislative remedy for unconstitutional state action.

ADEA is also appropriate enforcement legislation, as applied to mandatory retirement requirements, because it prevents the risk of unconstitutional action in at least

three ways. *First*, by shifting to employers the burden of justifying the relevance of, and necessity for, mandatory retirement provisions in administrative or judicial proceedings, Congress sought to eliminate the risk that false stereotypes about workers' abilities would be used to determine job performance potential, and thereby it acted to prevent the risk of unconstitutional discrimination. *Second*, Congress rationally concluded that while mandatory retirement rules sometimes may be defended on grounds other than the prediction of worker competence, such defenses are often asserted simply as a subterfuge for discrimination. Thus, the prohibition of such requirements also prevents the risk of unconstitutional discrimination. *Third*, Congress could prohibit mandatory retirement in order to minimize the risk that older workers would suffer arbitrary hiring discrimination when forced into the job market, based on its finding that such discrimination against older workers was commonplace because of the same stereotypic thinking that was usually behind mandatory retirement policies in the first place.

ARGUMENT

THE AGE DISCRIMINATION IN EMPLOYMENT ACT IS CONSTITUTIONAL AS APPLIED TO MANDATORY RETIREMENT LAWS BECAUSE IT IS WITHIN CONGRESS' POWER TO ENACT APPROPRIATE LEGISLATION TO ENFORCE THE FOURTEENTH AMENDMENT

Under § 5 of the Fourteenth Amendment, Congress is authorized "to enforce, by appropriate legislation, the provisions of" the Amendment.

> When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Consequently, if the ADEA's prohibition against mandatory retirement from state service is within congressional power under § 5, any principles of state sovereignty otherwise implicated by the Act are overriden by the power to enforce the Fourteenth Amendment. See, *Maher v. Gagne*, 448 U.S. 122, 132 (1980); *City of Rome v. United States*, 446 U.S. 156, 178-80 (1980); *Hutto v. Finney*, 437 U.S. 678, 693-94 (1978); *Fitzpatrick v. Bitzer, supra.*

The District Court refused to consider whether Congress' § 5 power would support the Age Discrimination in Employment Act (ADEA), because it concluded that Congress had acted solely under the Commerce power.[1] The Court relied on evidence that ADEA was enacted pursuant to the Commerce power, on its assumption that Congress failed to specify § 5 as the source of its authority, and on its belief that the absence of any such specification was fatal to sustaining ADEA under § 5. The de-

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[1] Having concluded that Congress acted only under the Commerce power, the District Court held ADEA unconstitutional as an infringement of state sovereignty under this Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976). *Amicus* fully supports the position of the appellant that the *National League of Cities* decision does not invalidate ADEA. ADEA's requirement that public employers may not arbitrarily treat *equally qualified workers* differently solely because of a class trait or characteristic not relevant to the employment decision is hardly the type of interference with state discretion proscribed by the Tenth Amendment. Arbitrary employment discrimination is not an "attribute of state sovereignty," nor would the states' compliance with ADEA "directly impair their ability 'to structure integral operations in areas of traditional functions.'" *Hodel v. Virginia Surface Mining and Reclamation Association*, —— U.S. ——, 101 S.Ct. 2352, 2366 (1981). However, in light of the fact that § 5 of the Fourteenth Amendment so clearly supports the exercise of congressional power in this case, the question of the application of *National League of Cities* to ADEA need not be reached. *Amicus* has thus briefed the applicability of § 5 to illuminate the availability of the alternative basis for decision.

cision below should be reversed because (1) Congress is not required to specify the constitutional basis for its legislation, and, in any event, the legislative history of ADEA demonstrates that Congress did in fact rely on its power under § 5; and (2) ADEA is clearly within the broad scope of authority delegated to Congress by § 5.

A. Congress' § 5 Enforcement Power Is One Source Of Authority Available To Sustain The ADEA

Congressional legislation must be upheld against constitutional challenge if the Court can find any delegated power which supports the legislative action. See, e.g., *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); *Keller v. United States*, 213 U.S. 138, 147 (1909). "The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co., supra*, 333 U.S. at 144. The only pertinent question is "whether there is any authority conferred upon Congress by which [a challenged] statute can be sustained." *Keller v. United States, supra*, 213 U.S. at 147. This Court's decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), upon which the District Court relied, does not alter these long recognized principles of judicial review.

The issue in *Pennhurst* was whether or not the particular section of the disabilities statute involved in that case was intended by Congress to create substantive rights and obligations enforceable against state authorities. See *id.* at 15. Although the question of congressional authority was not directly involved in the case, the Court examined two possible sources of authority for the disability statute, § 5 of the Fourteenth Amendment and the spending power, Article I, § 8, cl. 1, in order to help it discern Congress' intention. *Ibid.* According to the respondents in *Pennhurst*, if the statute had been an exercise of § 5 authority, the financial and other obligations

thereby imposed would have applied whether or not the state continued to receive federal funding under the statute. *Ibid.* Recognizing this far reaching result, the Court was unwilling to attribute to Congress an unexpressed intent to override significant state sovereignty protections.

> Because such legislation [under § 5] imposes congressional policy on a State involuntarily and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment. . . . The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States.

Id. at 16-17. See also *id.* at 35, 36 (White, J. dissenting).

Pennhurst thus does not articulate a new constitutional requirement that Congress identify for the edification of the courts the source of power used to support particular legislation; it simply applies the settled rule of statutory construction that requires a clear statement of congressional purpose to override state sovereignty before a statute will be so construed. See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973). In this case, however, it was unquestionably Congress' intention in the 1974 and 1978 amendments to the ADEA to mandate duties upon state and local governments. The only question raised here is whether the assertion of authority over state and local governments by ADEA falls within one or more powers delegated to Congress by the Constitution.

If evidence of congressional reliance on its § 5 authority is needed, however, the legislative history of the 1974 extension of ADEA to state and local governments, Pub. L. 93-259, 88 Stat. 74, contains substantial evidence that

§ 5 was one source of power used. Specifically, it is clear that in extending ADEA to state and local employers, Congress intended to exercise the same authority as it had exercised only two years earlier in extending Title VII of the Civil Rights Act to the same public employers, namely § 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer, supra*, 427 U.S. at 453, n. 9.

The 1974 ADEA amendment had its genesis in a bill, introduced by Senator Bentsen on March 9, 1972, whose sole purpose was to amend the ADEA to extend its application to state and local governments. S. 3318, 118 Cong. Rec. 7745.[2] That bill was introduced only one week following the issuance of the House-Senate Conference Reports on the 1972 Title VII amendments, which extended Title VII to public employers. H. Rep. No. 92-899, S. Rep. No. 92-681, 92d Cong., 2d Sess. (March 2, 1972). To assure prompt consideration of his ADEA extension bill, on May 4, 1972 Senator Bentsen offered it as an amendment to S. 1861, the bill then pending in Committee to amend the Fair Labor Standards Act (FLSA) in several respects. 118 Cong. Rec. 15894. In introducing his amendment, Senator Bentsen referred to "the recent debate on the EEOC amendment." *Id.* at 15895. He also noted specifically the extension of Title VII to state and local governments, as well as the Committee Report on the bill that this Court later cited in *Fitzpatrick* (427 U.S. at 453, n. 9) as evidence of Congress' reliance on its § 5 power. *Ibid.* Senator Bentsen then stated:

> I believe that the principles underlying these provisions in the EEOC bill are directly applicable to the Age Discrimination in Employment Act.

Ibid.

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[2] In introducing his bill, Senator Bentsen decried "the hiring and firing practices of governmental units [that] discriminate against the elderly," and referred to state laws and regulations that discriminate in retirement, promotions or hiring practices as "flagrant examples of discrimination." *Ibid.*

Although the Bentsen ADEA extension amendment passed the Senate in 1972, and again in 1973, it was not enacted into law in those years. However, the FLSA amendments, to which it was attached by the Senate in both years, also failed to be enacted. The original Bentsen proposal was again attached to the FLSA amendments bill in 1974, and finally succeeded in being enacted when the FLSA amendments were adopted by Congress.

In citing the need for the legislation, both 1974 committee reports quoted from President Nixon's 1972 message to Congress on older Americans, which had been delivered only days after the extension of Title VII was debated and one day prior to his signing the Title VII bill into law.[3] The message, and the reports, specifically linked the necessity for ending age discrimination in public employment to the problem of discrimination on the basis of race and religion which had been addressed in Title VII:

> discrimination based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion, or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group.

H. Rep. No. 93-913, 93d Cong., 2d Sess. 40 (1974); S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974).[4] The

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[3] The Title VII Conference Reports were issued on March 2, 1972, President Nixon's message was delivered on March 23, 1972, and the Title VII amendments were approved by the President on March 24, 1972.

[4] The President's 1972 message had expressed his support for legislation extending ADEA to public employers. 118 Cong. Rec. 9929 (1972). As it did in 1974, the Senate Committee on Labor and Public Welfare relied on and quoted this message when reporting out the Bentsen proposal as part of the unsuccessful 1972 FLSA amendments, see S. Rep. No. 92-842, 92d Cong., 2d Sess. 45 (1972), and again in reporting the same provision with the unsuccessful 1973 FLSA amendments, S. Rep. No. 93-300, 93d Cong., 1st Sess. 56 (1973).

Congress in 1974 thus reconfirmed the ADEA extension's original link to the 1972 Bentsen proposal and its close relationship to the Title VII extension in that year.[5]

The legislative history of the 1978 amendments to ADEA remove any doubt as to Congress' reliance on § 5. Those amendments, Pub. L. 95-256, increased the upper age limit to which the ADEA applied from 65 to 70 for non-federal workers, lifted the age limit entirely for federal workers, and, most importantly with respect to the issue in this case, clarified that the exception in § 4(f)(2) of the Act for bona fide benefit programs, 29 U.S.C. § 623(f)(2), did not allow such programs to compel mandatory retirement.[6] The purpose of the 1978 amendments was "to reduce the incidence of mandatory re-

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[5] The District Court mistakenly relied on the fact that the 1974 amendments were enacted in the same bill as the extension of FLSA to state and local governments as evidence of Congress' intention to rely exclusively on the Commerce clause. Not only were the FLSA amendments a ready vehicle for obtaining floor action on the ADEA extension when originally proposed, it was natural for it to be attached to the FLSA bill each year that it was considered since the ADEA is under the jurisdiction of the same congressional committees that handle FLSA, it is administered by the same federal agency as FLSA, and it uses the same enforcement machinery.

[6] This latter amendment was intended to overrule this Court's decision in *United Airlines v. McMann*, 434 U.S. 192 (1977), in which the Court construed § 4(f)(2) as validating retirement requirements that were part of employee benefit plans instituted prior to the effective date of ADEA. See H. Rep. No. 95-950, 95th Cong., 2d Sess. 8 (1978). Wyoming's mandatory retirement rule is part of a retirement pension program that was in effect prior to the extension of ADEA to state and local governments in 1974. See Wyo. Stat. § 31-3-103 et seq (1973). It is likely, therefore, that under *McMann* Wyoming's retirement requirement would have been sustained under the Act. The 1978 amendments are thus crucial to this case. The legislative history of those amendments are therefore relevant not only as an expression of Congress' view of the source of its power in extending ADEA in 1974, but also as contemporaneous legislative history for ascertaining Congress' understanding of its authority to proscribe mandatory retirement rules such as used by Wyoming in particular.

tirement for workers in private and state and local employment and to eliminate mandatory retirement on account of age for most federal workers." H. Rep. 95-527, Pt. 1, *supra*, at 1.

Congress paid close attention to the scope of its authority to apply ADEA to state and local governments in light of the *National League of Cities* decision. Two legal memoranda were included in the record of hearings on the 1978 amendments, both of which suggested the availability of § 5 as a source of power to extend ADEA notwithstanding *National League of Cities*. See Hearings on H.R. 14879, H.R. 15342, Subcommittee on Equal Opportunity, House Committee on Education and Labor, 94th Cong., 2d Sess. (Sept. 14, 1976), at 50 (Congressional Research Service); *id.* at 236 (National Senior Citizens Law Center). Further, in reporting favorably on the bill, the House Committee on Education and Welfare stated as follows:

> It should be emphasized that the current Age Discrimination in Employment Act and these amendments apply to state and local government employees. Although in *National League of Cities, et al. v. Usery* (426 U.S. 833 (1976)), the Supreme Court determined that Federal statutory minimum wage and overtime requirements cannot be applied to state and local governments because it would infringe on the rights of States and localities to regulate the terms and conditions of employment of their own employees, in several lower court cases since that time, the courts have all held that the ruling in the *League of Cities* case does not apply to Federal laws prohibiting employment discrimination.

H. Rep. No. 95-527, *supra*, at 5-6. The Committee cited eight cases, at least four of which *expressly* relied on Congress' § 5 authority to support their holdings that *National League of Cities* was no bar to employment discrimination legislation.[7] This history confirms Congress'

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[7] See *Usery v. Salt Lake City Board of Education*, 421 F.Supp. 718 (D. Utah 1976) (using § 5 authority to uphold ADEA); *Usery*

understanding that § 5 was at least one source of authority for ADEA, and that Congress specifically relied on § 5 as authority for the 1978 amendments.

B. ADEA Is Appropriate Legislation To Enforce The Fourteenth Amendment

1. Section 5 grants to Congress the same broad powers as are expressed in the necessary and proper clause, authorizing any legislation "plainly adapted" to the end of enforcing the Fourteenth Amendment. *Fullilove* v. *Klutznick*, 448 U.S. 448, 476 2774 (1980); *City of Rome v. United States*, *supra*, 446 U.S. at 176-77; *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

> Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

Katzenbach v. Morgan, *supra*, 384 U.S. at 651. Congress may enforce the Civil War Amendments by establishing a remedy, such as damages or injunctive relief, for violations. See, e.g., *Jones v. Mayer*, 392 U.S. 409 (1968); *United States v. Guest*, 383 U.S. 745 (1966). Congress also may enforce the Amendments by legislation that outlaws practices not themselves unconstitutional, but that carry a risk of unconstitutional discrimination. See, e.g., *City of Rome v. United States*, *supra*; *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, *supra*; *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

The Voting Rights Act cases demonstrate this latter aspect of Congress' enforcement power. In *South Caro-*

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v. Allegheny County, 544 F.2d 148 (3d Cir. 1976) (using § 5 authority to uphold the Equal Pay Act); *Usery v. Charleston County School District*, 558 F.2d 1169 (4th Cir. 1977) (using § 5 authority to uphold Equal Pay Act); *Usery v. Fort Madison School District*, 17 FEP Cases 593 (S.D. Iowa 1976) (relying on Title VII and *Fitzpatrick v. Bitzer* to uphold Equal Pay Act).

lina v. Katzenbach, supra, the Court upheld the constitutionality of the prohibition in the Voting Rights Act on the use of literacy tests in certain covered jurisdictions, despite the fact that the Court had previously sustained the use of fairly administered tests under the Fourteenth Amendment. The Court upheld Congress' exercise of its enforcement power because, after extensive investigation, Congress had concluded that the use of literacy tests in those jurisdictions would create a risk of discriminatory administration. 383 U.S. at 334.

In *Katzenbach v. Morgan, supra*, the Court again upheld the Voting Rights Act, insofar as it precluded New York from requiring residents educated in accredited American schools to pass an English language literacy test as a qualification for voting. The Court held that Congress could, under § 5, take the steps necessary to assure nondiscriminatory delivery of public services to Puerto Ricans. *Id.* at 652-53.

> It was enough that the Court could *perceive a basis upon which Congress could reasonably predicate a judgment* that application of literacy qualifications . . . would discriminate in terms of access to the ballot and consequently in terms of access to the provision or administration of governmental programs.

Fullilove v. Klutznick, supra, 448 U.S. at 477 (emphasis added). In *Oregon v. Mitchell, supra*, the Court upheld a nationwide ban on literacy tests as an appropriate means of eliminating the risk that such tests would be used in a discriminatory manner to reduce voter participation. 400 U.S. at 133.

Most recently, in *City of Rome v. United States, supra*, the Court held that Congress may constitutionally subject a covered jurisdiction to preclearance procedures for electoral changes that had only a discriminatory impact, and thus were not unconstitutional because of the absence of discriminatory intent. The Court held that Congress "could rationally have concluded" that there

was a need to prohibit otherwise constitutional practices that create the risk of illegal discrimination and that there was "no reason . . . to disturb Congress' considered judgment." *Id.* at 177-78.[8]

Under these precedents, ADEA is "appropriate" legislation to enforce the Fourteenth Amendment because it both provides a remedy for unconstitutional discrimination, and includes measures designed to prevent the risk of such discrimination.

2. In measuring state legislation against the dictates of the Equal Protection Clause, "this Court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate govern-

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[8] These decisions make clear that there is no merit to Wyoming's contention that ADEA is unconstitutional as applied to mandatory retirement laws because in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 207 (1976), the Court upheld Massachusetts' age 50 retirement requirement for uniformed policemen. The cases discussed in text all expressly hold that Congress is not restricted in its enforcement of the Civil War Amendments to prohibiting only such state action that this Court would hold unconstitutional. In *Katzenbach v. Morgan*, *supra*, the Court explained that

> A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.

Id. at 648. *Accord, City of Rome v. United States*, *supra*, 446 U.S. at 177; *South Carolina v. Katzenbach*, *supra*, 383 U.S. at 335. Moreover, there is no reason to assume that Wyoming's statute would pass muster under the Fourteenth Amendment, at least as applied to game wardens, which is the only job classification involved in this case. Wyoming has offered no rationale for its age 55 retirement provision, and it would be speculative to assume that it has one, or that the age limit reasonably serves any undisclosed purpose.

mental objectives." *Schweicker v. Wilson*, 450 U.S. 221, 230 (1981). ADEA enforces this constitutional requirement by providing remedies for irrational classification in employment based on age.

The ADEA was an outgrowth of extensive investigation by Congress and the Executive Branch into the causes of age discrimination in employment.[9] In the

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[9] Consideration was given to including age as one of the prohibited employment criteria when Title VII was first enacted, but, in order to gather further evidence of the scope of the problem, Congress deferred action pending completion of a report by the Secretary of Labor that Congress required in § 715 of the 1964 Act. 78 Stat. 265. That report highlighted the pervasiveness of age discrimination and its debilitating impact on older workers, see U.S. Department of Labor, Report to the Congress on Age Discrimination in Employment Under Section 715 of the Civil Rights Act of 1964 (1965), at 18-19, concluded that non-statutory means were unavailable to redress the problem, and recommended that

> [t]he elimination of arbitrary age limits in employment will proceed more rapidly if the Federal Government declares, clearly and unequivocably, and implements so far as is practical, a national policy with respect to hiring on the basis of ability rather than age.

Testimony of William D. Bechill, U.S. Commissioner on Aging, quoting the § 715 report, Hearings on H.R. 3651, H.R. 3768, H.R. 4221, General Subcommittee on Labor, House Committee on Education and Labor, 90th Cong., 1st Sess. 153 (1967). Congress' investigation of the possibility of legislation to combat age discrimination was comprehensive—it covered thorough hearings by the two relevant legislative committees and two select committees on aging in 1967, and was supplemented by additional hearings by all those committees approximately ten years later when the Act was amended to reduce substantially the incidence of mandatory retirement rules. (See *supra*, pp. 11-12.) See, e.g., Hearings on H.R. 3651, *supra*; Hearings on S. 830, S. 788, Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 37 (March 15, 1967); Hearings on Retirement and the Individual, Senate Select Committee on Aging, 90th Cong., 1st Sess. (July 7, 8, 26, 1967); Hearings on H.R. 14879, H.R. 15342, Subcommittee on Equal Opportunity, House Committee on Education and Labor, 94th Cong., 2d Sess. (Sept. 14, 1976); Hearings on

course of this investigation, and again in connection with its consideration of the 1978 amendments, Congress was presented with strong evidence that most age discrimination in employment was the product of stereotypic generalizations about the supposed inability of older workers to perform competently.[10] As summarized by Rep. Findley,

> The widespread practice of mandatory retirement is as arbitrary, capricious, and discriminatory as a policy that dictates that blacks cannot be hired. To justify this practice, proponents resort to stereotypes—older workers are slower, older workers are out sick more often, older workers can't be retrained. These excuses recall the folklore of a by gone era when some said—blacks are less intelligent, women can't do men's work, and other such stereotypes used to justify previous forms of discrimination. All those stereotypes are equally false.

H.R. 2588, Subcommittee on Equal Opportunity, House Committee on Education and Labor, 94th Cong., 2d Sess. (February 9, 1976); Hearings on the Impact of the Age Discrimination in Employment Act of 1967, House Select Committee on Aging, 94th Cong., 2d Sess. (February 10, 18, 25, 1976); Hearings on H.R. 65, H.R. 1116, Subcommittee on Equal Opportunity, House Committee on Education and Labor, 95th Cong., 1st Sess. (June 2, 1977); Hearings on S. 1784, Subcommittee on Labor, Senate Committee on Human Resources, 95th Cong., 1st Sess. (July 26, 27, 1977); Hearings on Active Americans Over 65: A Case Against Mandatory Retirement, House Select Committee on Aging, 95th Cong., 1st Sess. (July 11, 1977).

[10] See, e.g., Testimony of Willard Wirtz, Hearings on H.R. 3651, *supra*, at 7, 13; Department of Labor, Report to the Congress on Age Discrimination in Employment Under Section 715 of the Civil Rights Act of 1964 (1965), at 6; 113 Cong. Rec. 34742 (1967) (remarks of Rep. Burke); *id.* at 34752 (remarks of Rep. Dwyer); *id.* at 31254 (remarks of Sen. Javits); Testimony of Jack Ossofsky, National Council on Aging, Hearings on H.R. 14879, *supra* at 76; Testimony of Donald Elisburg, Assistant Secretary of Labor, Hearings on S. 1784, *supra* at 66; Testimony of Rep. Findley, Hearings on S. 1784, *supra* at 137.

Ibid. Congress was presented with [11] and it credited [12] substantial evidence that, contrary to the stereotypes, intelligence increases with age, older workers perform as well or better than younger workers, and use better judgment, are absent less often, and have fewer accidents. The Congressional investigations also produced evidence that analytical tools were usually available to employers to evaluate worker competence on a case-by-case basis, thus eliminating the need for most employers to use the inaccurate and hence discriminatory proxy of age as a measurement of ability.[13]

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[11] See, e.g., Testimony of Willard Wirtz, Hearings on H.R. 3651, *supra* at 7; Testimony of Rep. Findley, Hearings on H.R. 2588, *supra* at 6; Testimony of Rep. Pepper, Hearings on H.R. 65, *supra* at 9; Testimony of Sen. Domenici, *id.* at 52; DOL Report, Hearings on S. 1784, *supra*, at 317-388. Secretary of Labor Wirtz, for example, testified as follows:

> It now appears that up to the age of 60 there is very little dimunition of a person's work productivity in most occupations. Even after age 60, there is such a wide variety of productivity changes that age in itself is not a useful or reliable index of such change.
>
> There is increasing and persuasive evidence that in those cases where there does exist some dimunition in the productivity of a worker as he grows older, this dimunition is not the result of age itself, but stems from the worker's understandable reaction to the prevailing practices and mistaken attitudes regarding the effects of age.

Hearings on H.R. 3651, *supra*, at 7.

[12] See H. Rep. No. 95-527, Pt. 1, *supra*, at 4; S. Rep. No. 95-493, *supra*, at 3.

[13] See, e.g., H. Rep. No. 95-527, *supra* at 3; Testimony of Rep. Findley, Hearings on H.R. 65, *supra* at 65, and Hearings on S. 1784, *supra* at 139; Testimony of Rep. Pepper, Hearings on H.R. 65, et seq., *supra* at 8; Committee Print, Mandatory Retirement: The Social and Human Cost of Enforced Idleness, Select Committee on Aging, 95th Cong., 1st Sess. 34-35 (1977).

Based on its investigation, Congress carefully tailored a remedial solution to the problem of age discrimination in employment, and mandatory retirement rules in particular. ADEA is designed to sort out, through "case-by-case" administration, see H. Rep. No. 90-805, 90th Cong., 1st Sess. 7 (1967), the instances in which age is a relevant employment consideration from those in which it is not. Thus, finding age limitations not based on performance potential to be "arbitrary," 29 U.S.C. § 621 (a) (2), Congress made it unlawful for any covered employer to refuse to hire or to discharge any individual solely because of such individual's age, 29 U.S.C. § 623 (a) (1), unless age is shown to be "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. § 623 (f) (1).[14] This carefully designed procedural approach to

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[14] ADEA also permits employers to use "reasonable factors other than age" to make employment decisions even if the result is some differentiation between older and younger workers. *Ibid.* In testifying in support of ADEA in 1967, Secretary of Labor Wirtz explained that the intent of the bill was to isolate discriminatory from non-discriminatory uses of age:

> Nobody would support a national policy . . . of "discrimination" against older workers where there is no reason for it. The relevant inquiry about S. 830 is not about its purpose, but whether the situation it covers permits administrative distinction between cases where there is good and sufficient reason for adjusting the incidents of a person's employment to his age, and those cases where there is not that justification.
>
> This bill is drawn with close attention to this key distinction.
>
> It does not prohibit or apply in any way to differentiations or distinctions being made on the basis of age so far as there is legitimate relevance between age and employment capacity. The "discrimination" it is directed against is the "unjust" or "arbitrary" distinction (which is what "discrimination" is normally taken to mean) which may be made in the absence of any legitimate relevance between age and employment capacity.

Hearings on S. 830, *supra*, at 37.

the problem is a permissible congressional enforcement tool because it provides a remedy, i.e., damages, injunctive and other equitable relief, see 29 U.S.C. § 626(b), in those cases in which age distinctions prove to be irrationally premised on inaccurate stereotypes, and hence unconstitutional.[15]

3. ADEA does not prohibit only those employer practices that would be found to be irrational in a constitutional sense. To the extent that ADEA reaches conduct that may not be unconstitutional, it is nevertheless "appropriate" legislation under § 5 because, by prohibiting such state action, it prevents the risk of unconstitutional discrimination.

First, ADEA prevents the risk of unconstitutional discrimination on the basis of age by shifting to the public employer the burden of justifying its mandatory retirement rule and by requiring a higher standard of justification than would be necessary to sustain the rule under the Fourteenth Amendment. Cf. *Vance v. Terrazas*, 444 U.S. 252, 266 (1980). Having determined that in most cases older workers are capable of continuing in their jobs, that mandatory retirement rules have generally been based on factually incorrect stereotypes that older workers are not able to perform adequately, and that tools are available to employers to measure worker capability, see *supra* at 17-18, Congress could rationally have concluded that, in the

[15] This Court's decision in *Murgia* does not, of course, purport to sanction forced retirement requirements that do *not* rationally serve to assure fitness for the job. In *Murgia*, the Court pointed to state legislative determinations that men over 50 are not usually able to perform the arduous duties required of uniformed policemen. 427 U.S. at 314, n.7. The state law was upheld since it rationally "serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age." *Id.* at 315. Retirement provisions shown to be based on false assumptions regarding ability cannot be said to rationally further the objective of weeding out unfit employees.

absence of such proof, there would be a substantial risk that the age classification would be used as a camouflage for discriminatory and unconstitutional action.

Second, in prohibiting the use of mandatory retirement rules that might be defended on grounds other than their relationship to job performance, and that therefore would not meet the "bona fide occupational qualification" test, Congress acted to prevent the risk of unconstitutional action by eliminating the strong possibility that such explanations would in fact be used as a subterfuge for stereotyped judgments regarding older workers' competence.[16] Congress canvassed a range of arguments advanced by employers in support of mandatory retirement rules, and it determined that the factual basis for their use was missing.

For example, Congress rejected as factually inaccurate the suggestion that forced retirement is needed to reduce youth unemployment and provide needed and predictable work opportunities for younger persons. It found that the overwhelming proportion of workers retire when they reach the voluntary retirement age set in company or public pension programs, and that mandatory retirement

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[16] The record in this case does not inform the Court of the objectives purportedly served by the Wyoming mandatory retirement statute, nor is there any statutory findings or legislative history illuminating the state's purpose. There is strong circumstantial evidence, however, that the Wyoming requirement may be based on the state's assumption that game wardens are not capable of handling the physical requirements of their job after age 55. This is suggested by the inclusion of the game warden provision within a retirement provision also applicable to highway patrolmen, by the state's reliance on *Murgia*, and by the fact that a higher mandatory retirement age is applicable to other state employees, Wyo. Stat. § 9-5-214. See, *Massachusetts Board of Retirement v. Murgia*, *supra*, 427 U.S. at 315, n.7. The Court may therefore uphold ADEA as applied to the Wyoming statute without considering whether Congress had the power to invalidate the use of mandatory retirement when it is advanced as being intended to serve state interests other than those related to job performance.

tends to be used as a vehicle for thinning out the labor force rather than a method for opening up positions to new workers.[17] Similarly, Congress rejected the argument that maintaining older workers on the job will add to employer costs due to pension and other employee benefit plans, finding that it was just as likely that pension costs would actually decrease, since older workers would contribute longer and collect for fewer years.[18] And, as previously noted, Congress rejected the contention that employers could not individually evaluate the competence of older workers, finding instead that objective evaluation procedures were not only available, but were in fact regularly used for workers below mandatory retirement ages. See *supra*, at 18.

In light of this evidence, Congress could reasonably have concluded that in most cases non-performance related justifications for mandatory retirement really demonstrate reliance on stereotypes regarding ability. Thus, in permitting mandatory retirement rules only if they are shown to be bona fide and a reasonably neces-

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[17] See, e.g., H. Rep. No. 95-527, *supra*, at 129 (views of Rep. Weiss); Testimony of Rep. Findley, Hearings on H.R. 2588, *supra*, at 5; Testimony of Donald Elisburg, Hearings on S. 1784, *supra* at 70; Testimony of Rep. Pepper, Hearings on H.R. 65, *supra*, at 9.

[18] See, e.g., H. Rep. No. 95-527, *supra*, at 3; Testimony of Rep. Pepper, Hearings on H.R. 65, *supra*, at 9. In one respect Congress credited this argument, and provided for an exception to the age discrimination law where an employer follows a "bona fide employee benefit plan . . . which is not a subterfuge to evade" the Act. 29 U.S.C. § 623(f)(2). This exception permits employers to hire older workers without including them in such benefit plans. See, e.g., H. Rep. No. 95-527, *supra* at 8.

[19] For example, Senator Javits concluded, relying on the Department of Labor's report under § 715, see *supra* at 16 n.9, that a "significant proportion" of age requirements "are defended on grounds apparently different from their actual explanation." Hearings on S. 830, *supra* at 23.

sary determinant of job qualification, Congress again acted to prevent the risk that employers would arbitrarily rely on age as a predictor of ability.

Third, Congress also had the power to bar mandatory retirement rules in order to prevent arbitrary hiring discrimination against older workers forced to retire. Cf. *Katzenbach v. Morgan*, *supra*, 383 U.S. at 652-53. Congress acted on ample evidence that reentry into the labor force by workers who are capable of employment, but nonetheless forced to retire, was extremely difficult because of the same stereotypical thinking that was the premise of most mandatory retirement requirements.[20] Congress also heard testimony that mandatory retirement "puts the stamp of respectability on age discrimination" and creates an employment climate that fosters discrimination even against workers below retirement age.[21] By proscribing conceivably constitutional uses of mandatory retirement, Congress therefore acted directly to reduce the extent of *unconstitutional* age discrimination against older workers.

* * * *

ADEA was a moderate congressional response to a serious national problem. In reviewing the exercise of authority under § 5 in this case, appropriate respect for

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[20] See, e.g., Testimony of Jack Ossofsky, National Council on Aging, Hearings on H.R. 14879, *supra*, at 77-78; Statement by the Conference Board, Hearings on H.R. 65, *supra* at 155; Testimony of Sen. Domenici, Hearings on S. 1784, *supra*, at 53; Testimony of Donald Elisburg, *id.* at 68.

[21] See Testimony of National Retired Teachers Association and American Association of Retired Persons, Hearings on S. 1784, *supra*, at 197. Assistant Secretary Ellisburg testified that age discrimination in employment, like race and sex discrimination, flows from stereotypes and prejudices, and that "these prejudices are in the nature of self-fulfilling prophecies because the overall denial of opportunity pushes whole segments of our society into the very status of second-class citizenship which the stereotypes presume." *Id.* at 66.

the judgments, findings and remedial solutions of the Congress is due. As the Court has recently observed,

> in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.

Fullilove v. Klutznick, supra, 448 U.S. at 483.

CONCLUSION

The Court should uphold the Age Discrimination in Employment Act as "appropriate" congressional legislation to enforce the Fourteenth Amendment, and reverse the judgment of the District Court.

Respectfully submitted,

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No. 81-554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

v.

STATE OF WYOMING, ET AL.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

BRIEF OF THE CITY OF BALTIMORE AS AMICUS CURIAE IN SUPPORT OF APPELLEES, STATE OF WYOMING, ET AL.

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No. 81-554

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Appellant,

v.

STATE OF WYOMING, ET AL.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

BRIEF OF THE CITY OF BALTIMORE AS AMICUS CURIAE IN SUPPORT OF APPELLEES, STATE OF WYOMING, ET AL.

This is a brief of *amicus curiae* permitted by Rules 36.4 and 36.2. The written consent of all parties to the case has been lodged with the Clerk, and this brief is being filed within the time allowed for the filing of the Appellee's brief.

INTEREST OF THE *AMICUS CURIAE*

This case raises issues of great importance to municipalities across the Nation. Inherent within the municipalities' police power is the obligation to provide the public with fire prevention and protection. The effect upon municipalities is fully developed here because the City of Baltimore's retirement policies for "front-line" fire combat positions have been vitiated.

The burdens placed upon municipalities relating to fire protection may be profound. The City of Baltimore has a population of approximately 785,000 and consists of an area of 91.93 square miles, of which 78.72 square miles are land and 13.21 square miles are water. Baltimore has a waterfront of 46 miles of which 39 miles are developed. Fire prevention and protection are provided by the Baltimore City Fire Department, which currently consists of fifty-two engine companies (including two fire boats), twenty-nine truck companies, one heavy duty rescue wagon, sixteen medical units, and numerous special vehicles. The Department has a complement of 2,196 personnel. Between July 1, 1980, and June 30, 1981, the Department responded to a total of 120,225 emergency alarms. Within its borders there are five thousand vacant buildings, fourteen hospitals, forty nursing homes, fourteen domiciliary homes, ten underground parking lots, 1,507 high-rise buildings, 301 schools, six subway stations, two correctional institutions and thirty-one bulk oil facilities.

Each of the foregoing demands special care and attention in terms of preventing or extinguishing conflagrations. The Baltimore City Fire Department has developed and maintains an extremely good reputation in handling the diverse aspects of its charge. In terms of budget, equipment and staffing, the Baltimore City Fire Department, along with the Baltimore City Police Department, receives extraordinary concern. For example, the City

appropriates annually approximately $16.2 million to cover 5,061 active employees in the Fire and Police Employees Retirement System and spends only a fraction of that, about $7.2 million, to cover the remaining 15,701 City employees under the Employees Retirement System. Of the $16.2 million contributed towards the Fire and Police Employees Retirement System this year, the City will contribute approximately $8,700,000 just to fund expected disablements during this year. In addition, the City of Baltimore self-insures with respect to Workmen's Compensation liabilities. If that insurance were purchased, the rate would be determined by the National Counsel on Compensation Insurance and would be approximately $4,400,000 of which $2,550,000 would be for the Police Department and $1,850,000 for the Fire Department. Any purchased policy would most likely be under the retrospective rating method, placing the City at risk for all good or bad experience.

STATEMENT OF THE CASE

Amicus adopts here the Statement of the Case set forth in Appellee's brief.

SUMMARY OF ARGUMENT

The City of Baltimore provides a comprehensive scheme of benefits to its protective service employees in terms of liberal service, disability and Workmen's Compensation benefits. In the 1950's, fire and police employees lobbied for changes to the general pension system which would provide them with enhanced benefits and an early mandatory retirement. Because this mandatory retirement policy would have eliminated almost all officers, i.e., fire lieutenant, police sergeant or above, those employees were allowed to work until age 65.[1] A grandfathering clause allowed members in service on the day of the adoption of

[1] The EEOC has undertaken to challenge the authority of the City of Baltimore to retire officers at age 65. *See, Matassa v. Baltimore City Fire Department, et al.*, Charge Nos: 033-81-0142 and 033-81-0143.

the ordinance to continue until age 60, and anyone who transferred at the inception of the system could continue in service until completing 25 years or attaining age 65.[2]

The Equal Employment Opportunity Commission intervened in *Johnson v. Mayor of Baltimore*, 515 F. Supp. 1287, *cert. denied*, No. 81-1112 (Feb. 22, 1982), against the aforesaid provisions of the Fire and Police Employees Retirement System, as it sued directly the State of Wyoming based upon its retirement ordinance. This *amicus* asserts that the letter and logic of *National League of Cities v. Usery*, 426 U.S. 933 (1976), is dispositive of the *Wyoming* and *Baltimore* cases. The Age Discrimination in Employment Act, upon which the EEOC suits are based, was extended to cover political subdivisions in 1974. This *amicus* asserts that the ADEA's intrusion into the local legislative sphere is in violation of the Tenth Amendment because the Act provides no reasonable or substantive exception for political subdivisions. The structuring of retirement benefits, as deferred wages, is an inherent attribute of the sovereign. In fact, the policies of the City of Baltimore with respect to general City employment and employment in the protective services has anticipated relevant Federal practices by decades.

Because the ADEA places affirmative burdens upon political subdivisions to restructure the benefits provided to employees engaged in hazardous employment, this Court should not lightly ascribe to Congress an unstated intent to legislate pursuant to Section 5 of the Fourteenth Amendment. However, even if the legislation could have been predicated upon Section 5, the practical effect of the EEOC's administration of the law is to place the employment practices of political subdivisions regarding mandatory retirement under strict scrutiny, in direct contravention of this Court's holding concerning age-based classi-

[2] *See generally*, Baltimore City Code (1976 Ed.) Article 22, Section 34(a).

fications and without an iota of Congressional or constitutional authority.

ARGUMENT

THE APPLICATION OF THE ADEA TO POLITICAL SUBDIVISIONS IS UNCONSTITUTIONAL BECAUSE IT SIGNIFICANTLY DISPLACES LOCAL LEGISLATIVE JUDGMENT RELATING TO THE PUBLIC HEALTH, SAFETY AND THE WAY IN WHICH POLITICAL SUBDIVISIONS WILL STRUCTURE THE DELIVERY OF INTEGRAL GOVERNMENTAL FUNCTIONS.

It is a cruel irony which casts this *amicus* as a law breaker, as an employer held to have arbitrarily retired its employees in protective service positions. The history of the City of Baltimore in its course of dealings with protective services proves that through its Mayor and City Council, the City has acted rationally and with a foresight which anticipated federal law by, in some cases, one-half century. With respect to the health hazards associated with working in protective services, the City anticipated parallel federal provisions by more than a decade. The City is now portrayed as among those which make a "bald assertion of a prerogative to be arbitrary". Brief of EEOC at p. 19. Such an accusation insults the wisdom, discretion and good faith of legislatures across the country and reflects a deeply disturbing ignorance of the issues.

The City of Baltimore presents challenges to the protective services as formidable as any found elsewhere in the country. See *supra*, pp 2-3. Affording fire protection, in terms of fire prevention and suppression, requires that the City's fire service be equipped and trained to combat fires in large residential neighborhoods, a major port, numerous hospitals and a complete gamut of high-rise office buildings. A firefighter may be called from hours of cozy indolence to perform lifesaving rescues in a matter of moments.

The budget of the Baltimore City Fire Department has been pared along with the budget of virtually every

political subdivision. For example, fire houses which were not considered absolutely necessary have been closed. The complement of firefighters on a given vehicle has been cut from six to four. Officers, whose exclusive function was once to supervise the fighting of fires, are now often involved in fire suppression.

Against this background of reduced resources and bloated responsibilities, the City of Baltimore makes retirement mandatory for its protective service personnel at age 55 with certain exceptions. This legislative policy is found in Article 22 of the Baltimore City Code, Sections 29, *et seq.*, generally known as the "Fire and Police Employees Retirement System" (F&PERS). The F&PERS represents the culmination of the City's experience with compensating its protective services for more than one century.[3] In the case of *Johnson v. The Mayor of Baltimore*, 515 F. Supp. 1287 *cert. denied*, No. 81-1112 (Feb. 22,

[3] Prior to the Civil War, the City of Baltimore was protected for fire by diverse and highly competitive volunteer fire companies. In those days, Baltimore was occasionally referred to as "'mob town', a title which arose at least partly from its lively interest in fires and its intensely partisan citizens who lined up in defense of their favorite volunteer companies. . . ." On December 10, 1858, in response to this problem, the Mayor of Baltimore signed a bill creating a paid department with steam equipment. Griffin, Gerald, "Seventy-five Years of Fire Fighting" (unpublished) Enoch Pratt Library, Maryland File, 24 January, 1942. In 1879, the Mayor and City Council enacted Article 22, Section 25 of the Code (which continues in force today as Article 9, Section 13 of the Code), which provided than an incapacitated firefighter would receive his usual salary for 12 months. The annual appropriations for the relief of disabled firefighters began on April 10, 1880, as Chapter 409 of the Laws of the State of Maryland (1880). Further enactments relative to the compensation of disabled and superannuated firefighters were: Chapter 312 of the Laws of the State of Maryland (1884); Chapter 463 of the Laws of the State of Maryland (1886); Chapter 393 of the Laws of the State of Maryland (1888); Chapter 190 of the Laws of the State of Maryland (1894); Chapter 334 of the Laws of the State of Maryland (1896); Chapter 123 of the Laws of the State of Maryland (1898); Chapter 283 of the Laws of the State of Maryland (1922); Chapter 411 of the Laws of the State of Maryland (1924).

1982), the City has been told that it may no longer determine the terms and conditions of employment in accordance with its legislative policy.

At the outset this *amicus* wishes to state plainly that it has no brief for arbitrary discrimination in employment. It agrees entirely that the relationship between political subdivisions as employers and their employees should be structured according to a public policy that calls for the maximum utilization of individual ability, to be weighed only against considerations of public safety. It is simplistic and deceptive for EEOC to imply that all who would reserve for local judgment decisions about striking that balance would do so with *mala fides*. Moreover, that view is plainly wrong.

Between 1880 and the early 1920's the City of Baltimore paid for disability and service retirement of its employees on the basis of annual appropriations to cover yearly payments. Because a system of appropriations for yearly expenses did not provide the security which is essential to retirement benefits based either on service or disability, the City planned and adopted the first actuarial retirement system to be created in the State of Maryland. In that plan, the "Employees Retirement System" (ERS), the Mayor and City Council guarantees the right of all of its employees to work until the age of 70, and has done so since the inception of the plan in 1926. Federal law did not provide this protection until 52 years later. The Mayor and City Council relied then, as now, upon the legislative process and the collective wisdom of actuaries and other experts to establish retirement systems by ordinance.

Despite the intense effort which preceded the ERS, the intervening years between 1926 and the 1950's revealed evidence which led protective service employees to believe the ERS did not fit their special needs. Firefighters and law enforcement personnel argued there was convincing medical evidence that because of their employment they were uniquely susceptible to occupational disease of the

heart and lungs. Consequently these employees were dying before age 60 which was (and is) the earliest elective age for retirement in the ERS. A special committee of City officials was appointed to report to the legislature and ultimately an amendment to the ERS was proposed to accommodate the special needs of the protective services at the demand of protective service employees and their unions. Because of limitations in the City's Charter, the amendment was ruled illegal. Still convinced of the need for change, the City sought and obtained special enabling legislation from the State of Maryland. As a result, a bill creating a new Fire and Police Employees Retirement System, including an option to join the plan and a mandatory retirement age of 55, was drawn. This bill was circulated among protective service personnel and approved by plebiscite. Thereafter, the bill was submitted for legislative debate and in due course was enacted as law. This is no "purely arbitrary (age limitation), based on nothing more substantial than the general truth that physical ability declines with age." Brief of EEOC, p.34. It is instead considered public policy developed by this political subdivision regarding the manner in which it will structure the delivery of protective services to the people of Baltimore.[4]

[4] It should be noted that the F&PERS did not simply establish mandatory retirement ages. It *restructured* the way in which benefits would be delivered to protective service personnel. It allowed a protective service employee to retire at his option as early as age 50. For all protective service employees, the new F&PERS Ordinance increased the service credit to be given these employees for each year of credited service. That increased benefit was not offered by the Mayor and City Council to the ERS because protective service employees were not to be treated in a manner dissimilar to other City employees, except to the extent that by virtue of the nature of the work performed, the legislature found that those employees had shorter working lives. Since the service retirement benefit is the member's average final compensation times a fraction, the numerator of which is the number of years of credited service and the denominator of which is a constant, as the numerator is decreased, for the fraction to have the same value, the denominator must be proportionately decreased. Therefore,

I. Constitutional Authority of the ADEA.

The legislative history of the ADEA and the law itself warrant a conclusion that Congress was using its commerce power to enact the ADEA in 1967 and to extend the coverage to political subdivisions by changing the definition of employer.

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while the ERS Plan A member is entitled to 1/120th of his average final compensation for each year of credited service (see Section 6(b) of Article 22, Baltimore City Code, *supra*), the F&PERS is entitled to 1/100th for each of the first 25 years of service, and 1/120th of his average final compensation for each year of credited service thereafter (see Section 34(b) of Article 22, Baltimore City Code, *supra*). This pension is to be supplemented by an annuity plus a supplemental pension which guarantees that the calculation of actual payments to the retired employees are actually double what the calculation set forth above would yield. At the trial of *Johnson v. The Mayor of Baltimore, supra,* the Director of Finance for the City of Baltimore, Charles L. Benton, testified about the process by which the F&PERS was created. He testified that benefit levels were structured in the F&PERS not as a windfall to the members, but to approximate equivalent percentages of preretirement income. For example, benefits under the F&PERS were structured so that at the earliest age at which a member became eligible for retirement he would enjoy one-half of his average final compensation. A member of the ERS who reached age 60 and had 30 years of creditable service would be entitled to 30 × 1/120 × = ½ average final compensation. Similarly, a member of the F&PERS who spent half his working life for the Mayor and City Council and who reached the minimum age of eligibility for retirement, which is age 50 under the ERS, would receive 20 × 1/100 × 2 = ½ average final compensation. The plaintiffs' ultimate goal in *Baltimore I* (515 F. Supp. 1287 (1981)), was to make the City of Baltimore not only retain them in employment, but to pay these enhanced service retirement benefits beyond the plan's normal retirement age. The plaintiffs in *Baltimore II* have complained bitterly that the failure to credit them with enhanced service credit time is in itself a violation of the ADEA. *See generally, Johnson v. Mayor and City Council of Baltimore, et al.*, No. H-81-3253 (D. MD.) Civil Complaint. What plaintiffs fail to grasp is that if the decision to retire mandatorily protective service employees is unreasonable, then the decision to credit them with enhanced service credit predicated upon the mandatory retirment age is likewise unreasonable. The logical extension of the District Court's judgment is that the legislative underpinnings of the entire

EEOC infers that Congress regarded arbitrary discrimination based on age as "invidious" and comparable to discrimination based on sex or race. Brief of EEOC at p. 25. This statement is untrue and fallacious. As EEOC accurately reports, the ADEA had its origins in a report mandated by Section 715 of the Civil Rights Act of 1964, to be prepared and filed by the Secretary of Labor. The introduction to that report noted:

> The Nation has faced the fact-rejecting inherited prejudiced or contrary conviction — that people's ability and usefulness is unrelated to the facts of their race, or color, or religion, or sex, or the geography of their birth. Having accepted this truth, the easy thing to do would be simply to extend the conclusions derived from it to the problem of discrimination in employment based on aging, and be done with the matter. *This would be easy — and wrong*. Legislative History of ADEA, p. 19 (Emphasis added).

The report went on to note that "discrimination" in employment practices based on age means "something very different" from what it means with discrimination involving — for example — race. *Id.*, p. 10. Responding to the mandate of Congress, the Secretary of Labor found as fact that:

> Discrimination in employment based on race, religion, color, or national origin is accompanied and often has its origins in prejudices that originate outside the sphere of employment. There are no such prejudices in American life which apply to older persons and which would carry over so strongly into the sphere of employment. . . .
>
> We have found no evidence of prejudice based on dislike or intolerance of the older worker. *Id.*, p. 23 (Emphasis in original).

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pension system are void, thus eradicating the evolution of protective legislation since 1878. Taken together, *Baltimore I* and *Baltimore II* are an attempt by the plaintiffs to reverse the maxim, "One who has had his cake, so to speak, may not claim that he is being discriminated against because he may not now eat it too." *Bouffier v. Frank*, 389 F. Supp. 502, 505 (D.C.N.Y. 1975).

During the Congressional debates, the view that arbitrary discrimination based on age was essentially a misunderstanding was reiterated:

> Age discrimination is *not* the same as the insidious discrimination based on race or creed, prejudices and bigotry. These discriminations result in employment because of feelings about a person entirely unrelated to his abilities to do a job. This is hardly a problem for the older job seeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance. 113 Cong. Rec. 34742 (remarks of Rep. Burke) (Emphasis added). *Id.*, at 34752 (remarks of Rep. Dwyer); *Id.*, at 31254 (remarks of Sen. Javits). *See generally*, 90 Harv. Law Rev. 380 (1976), p. 383 n. 19 and authorities cited therein.

All authorities seem to agree that age discrimination differs from invidious discrimination on at least two important grounds. First, age *is* at some point inherently related to ability, a fact which is implicitly recognized by both the legislative history and the provisions of the ADEA. 90 Harv. L. Rev. 380 (1976), p. 383, n. 23. Moreover, both authority and common sense support the assertion that when age discrimination does exist, it is properly attributed to inaccurate employer estimates of the abilities of older workers and the effects of aging on productivity rather than to any general feelings of hostility or indifference towards individuals between the ages of 40 and 70. *Id.*, n. 24.

Besides being "easy and wrong", EEOC's bald assertion is illogical. For example, the ADEA does not require equal treatment of those obviously considered unequal. Thus an employer is not required to afford older workers the same benefits as those which are afforded younger workers. 113 Cong. Rec. 31225 (1967), Legislative History of ADEA, p. 146; Brief of EEOC, at p. 13, n. 5. A fair reading of the legislative history reveals that there was concern in Congress for the additional financial burdens to be borne by employers in retaining older workers. But the unmis-

takable tenor of the debates was that legitimate commercial interests must be protected while removing from the employment sphere unreasonable commercial judgments based on age. It is obvious that the ADEA is essentially commercial legislation directed at what Congress viewed as ill-conceived judgments concerning efficiency of production and the economic worth of the individual in employment. This is a markedly different situation from the underpinnings of Title VII or even the Equal Pay Act. It is true that the Equal Pay Act was predicated upon a burden on commerce, but that burden resulted from inherent prejudices against women spilling over into the realm of employment. In the case of older workers, it was recognized that there is some point at which age is inherently related to ability; this essential factor, the difference between commercial judgment and bigotry, differentiates the ADEA from legislation based on any other individual attribute. *Naton v. Bank of California*, 72 F.R.D. 55 (1976), 555.

With respect to the constitutional authority of the 1974 amendments, EEOC quotes Sen. Bentsen concerning "principles underlying these provisions in the EEOC bill." Brief of EEOC at p. 24. The words "these provisions" refer to a committee report prepared when extending Title VII of the Civil Rights Act to political subdivisions. Sen. Bentsen read into the Congressional Record an excerpt which said:

> The Committee believes that employees of state and local government are entitled to the same benefits and protections in equal employment as the employees in the private section of the economy. Legislative History of the ADEA, p. 208.

When Sen. Bentsen affirmed "these principles", he was obviously referring to the level of benefits to be afforded government employees. Even taking the remark out of context, as EEOC does, it requires almost magical machinations to find Congressional authority to legislate pursuant to Section 5 of the Fourteenth Amendment in this aside.

EEOC has difficulty justifying its current assault upon mandatory retirement ages for protective service employees employed by political subdivisions, especially in light of the federal mandatory retirement age for these positions. The EEOC says:

> The rationale appears to be that the federal government can insure that when a mandatory retirement age is imposed on certain federal employees in the interest of public safety, the employees thus restricted are liberally compensated. Such a balance may not be struck by local and state governments and thus age restrictions are disallowed, at least without a showing that age is a BFOQ. Memorandum from Constance L. DuPre, Associate General Counsel, Legal Counsel Division, to Leroy D. Clark, General Counsel (14 August 1980) p. 4.

It seemed odd to this *amicus* that the EEOC would litigate BFOQ's relating to protective service employees with such ardor. The ultimate reason was not one of humanitarian interests, nor a conviction that what it was doing was in the interest of justice or in furtherance of Congressional mandate. The reason was simply one of tactics: the EEOC realized it was extremely difficult to prove a bona fide occupational qualification, and wished to litigate these cases knowing full well that despite the merits of the political subdivision's position, the political subdivision *could not* prevail. In commenting upon a report received by EEOC from the California Highway Patrol, prepared in defense of its entry-level age restriction and mandatory retirement policy, EEOC's Associate General Counsel wrote:

> The state and local agencies have only recently been predicating their defense of age limits on the issue of public safety. It appears that they have yet to develop sophisticated statistical defenses that will be *necessary* to support the age BFOQ's in the protective occupations. *Id.* at p. 9 (Emphasis added).

Thus EEOC knew at that early date that the "reasonableness" of legislative decisions was far removed from its

interpretation of the law, and in fact had absolutely no weight in their scheme of "enforcement".

In this Court, EEOC argues into obscurity the "minimal" burdens placed upon political subdivisions by the ADEA. Beforehand, it knew full well that no political subdivision in the country possessed the sophisticated sort of defenses necessary to establish a BFOQ. This is an abhorrent tactic for any litigant to employ, much less the agency of the United States Government charged with fair and just administration of the law. Implicit in the tactics, as reprehensible as it may be, is the common sense recognition that the area of protective services requires standards of employment, particularly as they relate to age, which are unique to that area.

In the case of *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court sustained allocations of a percentage of federally financed contracts against, *inter alia*, charges that the program was overinclusive. Before this Court defeated that contention by noting the provisions built in for exemption and waiver, the Court noted that with due account for its administrative program, the law must have provided reasonable assurances that taking into account exemptions and waivers, the enforcement of the law would be limited to accomplishing its remedial objectives and that misapplications of the program would be promptly and adequately remedied administratively.

An exception or exemption which does not exist in fact should not be a defense to Tenth Amendment challenges to constitutionality. While the EEOC argues into triviality the burdens placed upon political subdivisions, in point of fact, at the demand of the EEOC, the BFOQ is treated as a matter of strict judicial scrutiny by the Courts.

What EEOC is saying is that the political subdivisions are under a simple duty to act reasonably, but when brought into a court of law to justify the "reason" behind their actions, they must prove that alternatives were *impossible* or *highly impractical*. Despite how the BFOQ is

couched, for all practical purposes a political subdivision must show that its actions are essential to a compelling governmental interest, notwithstanding this Court's pronouncement that age *per se* does not create suspect categories — discrete and insular minorities deserving of extraordinary protection from the majoritarian process. Thus the City of Baltimore has no quarrel with the general proposition set forth by the EEOC that within levels of judicial analysis, Congress may broaden judicial concepts of judicial protection when necessary and proper under Section 5 of the Fourteenth Amendment. A distinction should be made between laws which broaden equal protection guarantees within a given level of scrutiny as against those which overreach judicial determinations made by this Court. *Amicus* relies upon the dissenting opinion of Justice Harlan, joined by Justice Stewart, in the case of *Katzenbach v. Morgan*, 384 U.S. 641 (1966). *Id.*, p. 666.

Amicus asserts that not only is it incorrect and disingenuous for the EEOC to submit that the ADEA only places minimal and slight burdens on political subdivisions, but at the hands of the EEOC and the Department of Labor political subdivisions are subjected to strict scrutiny of their retirement practices. In *Johnson v. The Mayor of Baltimore, supra,* the Court was not satisfied with just the Weeks-Diaz test formulated and adopted by various circuit courts of appeal. For example, in *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969), a woman was denied employment solely because the employer believed that no woman could lift thirty pounds. In the *Weeks* opinion, the Fifth Circuit wrote that it was improper to rely upon generalities when the ability to lift thirty pounds was so easily proved. In *Johnson v. The Mayor of Baltimore, supra,* the District Court cited this case with authority for its conclusion that because there existed a complicated and confused means of structuring exercise stress testing, thalium perfusion studies, radiotechnecium ventriculography, and cardiac

catheterization, the City of Baltimore was unable to apply a reasonable general rule to the retirement of its police and fire personnel. Considering that the judgment of the District Court in the case below will require that the City of Baltimore subject at least some of its employees to surgical procedures in order to remove them from employment, the argument of EEOC that political subidivisions are only held to "reasonableness" standards is farcical.

II. Satisfaction Of The *National League* Test.

A. *The Act Regulates the States* qua *States.*

It is obvious that the ADEA displaces the policy choices of states and other political subdivisions as employers in exactly the same way as the other sections of the FLSA imposed minimum wage and maximum overtime provisions on the political subdivisions in *National League of Cities v. Usery, supra.* It is noteworthy that EEOC considers retirement to be so intimately associated with wages that retirement benefits are not included within the phrase "full fringe benefits." See, EEOC's *Determination and Invitation to Participate in Settlement Discussion,* Matassa v. Baltimore City Fire Department/Board of Trustees of Fire and Police Employees Retirement System, and Mayor and City Council of Baltimore, Charge Nos. 033-81-0142, 033-81-0143, dated May 3, 1982. In the charging document, the district director of EEOC states,

> In order to comply with the Act and curtail the initiation of litigation proceedings by the Commission, Respondents must agree to immediately reinstate Charging Party to his position of Fire Lieutenant with the Baltimore City Fire Department, with back pay and full fringe benefits retroactive to . . . the date of his forced retirement.

Either the EEOC is again engaged in deceptive and duplicitous arguments in seeking to have these employees continue to receive service credit time as a fringe benefit, in stark contravention of its position here, or it considers

retirement benefits as so intimately connected with wages as to be not within the concept of fringe benefits.

EEOC harps upon the minimal burdens placed upon the political subdivisions by the ADEA. Yet it recognizes that the employer bears the burden of proving a BFOQ, and furthermore, it knew that because of the strictures placed upon the BFOQ by it and the Courts, elaborate and sophisticated statistical defenses would need be developed by subdivisions attempting to invoke a BFOQ. See, *supra*, p. 11-12. These elaborate technical defenses would require what amounts to experimenting with the safety, health and well-being of the employees and inhabitants of the subdivisions. For, if the test is as EEOC posits, that these employees possess a trait which precludes safe and efficient performance in their very hazardous jobs, how else could these elaborate sophisticated technical defenses be fashioned except by placing aged protective service employees in the positions which the mandatory retirement age was designed to eliminate? This constitutes, by any measure, a profound interference with the subdivision's judgment and legislative freedom of choice. The costs, liabilities and strictures from which the federal government so gracelessly has exempted itself are to be borne by none other than the political subdivisions. *See generally, Stewart v. Smith*, No. 80-1340 (D.C. Cir. Mar. 9, 1982).

B. *The Act Addresses an Attribute of State Sovereignty.*

It is unfortunate that EEOC relegates the main issues in this case to footnotes in its Brief, e.g., Brief of Appellant, pp. 19-20, n. 10. Title 5 U.S.C. Section 8335, requires retirement for, *inter alia*, the equivalent federal group to those for whom EEOC litigated *Johnson v. The Mayor of Baltimore*. The age at which retirement is required is 55 for federal firefighters as well as those in identical positions employed by the City of Baltimore. The relevant amendment to the federal pension plan requiring

retirement for this group was passed in the same year that the ADEA was extended to political subdivisions. Apparently as a result of exactly the same sort of study conducted by the Mayor and City Council in this field, it was noted in the legislative history of the law, then P.L. 93-350:

> The history of retirement legislation dealing with law-enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age 50. This intent has been based on the nature of the work involved and the determination that these occupations should be comprised, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service. They are occupations calling for the strength and stamina of the young rather than the middle aged. Older employees in these occupations should be encouraged to retire. S. Rep. No. 93-948, 93d Cong., 2d Sess. (1974), p. 2.

The Chairman of the U.S. Civil Service Commission wrote to the Senate Committee on Post Office and Civil Service as follows:

> The Commission objects to (the provision to fund early mandatory retirement by increasing from 7 percent to 7-½ percent the contribution rate of law enforcement officers and firefighters, with a corresponding increase in agency contribution rate), believing that preferential benefit provisions for any class of employees can be justified only when they serve a management purpose. We could agree with changes into law which would increase costs — early retirement and a guaranteed annuity of 50 percent of average pay after 20 years of service — but these are not special gifts or liberalizations intended primarily to benefit the class of employees affected. They are part of a plan to benefit management by keeping law enforcement and firefighting services young and vigorous. *Id.*

Debate among House members on this provision flatly rejected any suggestion that the mandatory retirement age was anything but a public policy decision by Congress; that when the balance was struck between the employees' expectations of continued employment weighed against the public safety, prudent legislative judgment required retirement of these employees at age 55 with benefits structured to encourage retirement as early as age 50. 119 Cong. Rec. (1973), p. 30590, (remarks of Rep. Brasco).

Proponents of the bill argued:

> I maintain that (the bill requiring retirement at age 55) affects 220 million Americans. *The strength of our city and our cities and towns across the country depends in large part on our law enforcement personnel and our firefighters who put their lives on the line each and every day, 24 hours a day.* . . . (U)nless we begin to take the type of action contemplated in (this bill), the Federal Government is just not going to be able to compete with many local law enforcement agencies and fire departments in attracting and holding qualified and effective employees. *Id.*, p. 30592. (Emphasis added).

Generally, in the view of the Civil Service Commission and members of the committee considering this bill, differences in the hazards of a profession were compensated by wage differentials. Section 8335(b) was clearly not introduced simply to enhance the benefit structure for certain federal employees; its purpose was to effectuate congressional policy towards mandatory retirement of law enforcement and firefighting personnel. This policy was adopted by Congress notwithstanding the fact that, "state and local firefighters face *thirteen times* more risk than [certain federal firefighters] do. *See generally*, "Special Retirement Policies as Related to Mandatory Retirement for Law Enforcement Officers, Firefighters and Air Traffic Controllers", Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service: House of Rep., 95th Cong., 2d Sess., 5 October 1978, p. 13. By what corruption of the word "reasonable"

may a political subdivision, which generally has the obligation to afford its inhabitants protection under its police power, knowing that those affording fire protection may be at more risk than federal firefighters, be said to have been "unreasonable" in extending to its protective service personnel the same policy adopted by Congress?

If the congressional judgment concerning the mandatory retirement of federal firefighters and law enforcement personnel was not within the attributes of sovereignty, then that judgment had to be "arbitrary", as the word is used by EEOC in its enforcement of the Act. It is not enough, the EEOC maintains, before inferior courts, that the legislature acted "reasonably". The defendant political subdivision must prove that it is *impossible* or *highly impractical* to deal with its employees on an individualized basis, or that all or substantially all employees will not be able to continue employment in a safe and efficient manner, except as removed by age.[5]

This impales political subdivisions, including this *amicus*, squarely on the horns of a dilemma. In trial court, defendant political subdivisions are held to an almost impossible task because the guidelines advocated by the EEOC result in virtual strict scrutiny of retirement

[5] The District Court found it significant that there was a time when protective service personnel were not retired mandatorily. The District Court failed to grasp that, according to uncontradicted testimony, the protective services had undergone a process of "civilianization". Before the 1960's, there were numerous positions in the Fire and Police Departments which were not related to public safety. Thus ordinary file clerks and messengers would be considered "firefighters" or "policemen". Partly because of the enormous burden of the F&PERS, positions in the protective services not directly related to public safety were filled by civilian employess who were not eligible to join the F&PERS. An employee classified as a "firefighter" in the 1940's could work until age 70, because there was sufficient laxity in the structure of the protective services to accommodate employees who were not capable of performing police duty on the street or fire combat. *See generally, Travers v. Fogarty*, 187 Md. 348, 355-6, (1946).

practices. When this *amicus* petitioned for certiorari before this Court so that its plight might have been considered contemporaneously with that of Wyoming, EEOC argued that, "Petitioners' argument is, at bottom, nothing more than a disagreement with the District Court's application of the BFOQ defense in the particular circumstances of this case, in view of the special attributes required for persons in firefighting and other public safety occupations. *This is an ordinary question of statutory interpretation, and one that is not directly involved in* EEOC v. Wyoming, supra, *with which petitioners seek to link this case.*" Brief for the Equal Employment Opportunity Commission in Opposition at p. 9. (Emphasis added). However, before this Court, the EEOC argues that this "ordinary question" which is not involved in the case at bar is indeed one of the saving graces of the constitutionality of the ADEA. Before this Court, the EEOC argues that the ADEA does not impermissibly interfere with, "The state's legitimate interest in retiring employees who are too old to perform adequately." The very next sentence quotes Section 4(f)(1), which is the BFOQ exception. Brief of Equal Employment Opportunity Commission at p. 10. The question is not whether words can mean so many different things, but "which is to be master — that's all." If the ADEA does prohibit only arbitrary action on the part of political subdivisions, as EEOC argues in this Court, then it exceeds its authority when it seeks and obtains judicial review beyond the prohibitions of the law. However, if the Act provides for heightened scrutiny, as EEOC suggests in trial courts, then it must be seen to interfere impermissibly with the way in which this and other political subdivisions will deliver essential governmental services to the people, whether those services are game husbandry or fire protection. Acting under the Commerce Clause, or without specific stated intentions to legislate pursuant to Section 5 of the Fourteenth Amendment, the extension of the ADEA to political subdivisions was unconstitutional. *Pennhurst State School & Hospital v. Haldeman*, 451 U.S. 1 (1981); *National League of Cities v. Usery, supra.*

C. *The Act Displaces States' freedom to structure integral operations in areas of traditional governmental function.*

The payment of service or disability retirement benefits is clearly an element of compensation. Indeed, the payment of retirement benefits is generally predicated upon only two variables, the length of service as a wage-earning employee and the employee's average final wage. Those eligible for retirement benefits under either plan are only those who have their wages paid by the Mayor and City Council. When attracting candidates for the protective services, the payment of benefits in lieu of wages upon disability or service retirement is a key part of the employment benefit package. Any diminution in the amounts or conditions of coverage will adversely affect the City's ability to attract qualified applicants for the protective services.

The Mayor and City Council could have had no pecuniary incentive to require retirement at age 55 since under the conditions then existing it was enormously more costly to retire an employee at age 55 than at age 70. All of the breast beating about the humanitarian position of the EEOC in abolishing these considered policy choices is fundamentally misguided here. The intent behind the F&PERS and its attendant age of retirement was (and is) to allow employees in very hazardous positions to maximize the time spent in life by removing them from overly taxing positions which were causing death before those employees could retire under existing law.

If, as this *amicus* has heretofore argued, the F&PERS was a more costly system when it was created, why then is this now an intrusion? The answer is very simple: legislation does not exist in a vacuum. The Mayor and City Council has not only contracted to provide its fire and police employees with pension benefits, but is also obligated to provide Workmen's Compensation benefits under the laws of the State of Maryland. See generally, Anno-

tated Code of Maryland, Article 101, §§ 1 *et seq.* One of these laws creates, only for paid firefighters and law enforcement personnel, a presumption that any impairment in health due to a circulatory or respiratory infirmity shall be presumed to be compensable. Annotated Code of Maryland, Article 101, § 64A. While the Workmen's Compensation Law provides for a setoff so that a political subdivision's pension benefits satisfy Workmen's Compensation liability, in cases involving heart or lung impairment, the employee shall receive his full pension in addition to any Workmen's Compensation award, only to be adjusted so that he is not paid more than full salary. Compare Annotated Code of Maryland, Article 101 § 33(c) with § 64A. Reflecting upon the figure reproduced in the Appendix, the tremendous financial impact upon at least this political subdivision is obvious. For those sustaining primary cardiac events older than age 55, the City will now have to presumptively pay Workmen's Compensation benefits, or Workmen's Compensation benefits in addition to disability retirement, should those employees be forced to retire.[6] Furthermore, if the City attempts to apply this complicated testing paradigm mandated by the District Court, any employee found not fit for retirement will have a presumptive right to Workmen's Compensation benefits in addition to disability retirement. Heretofore, these employees have been retired on service retirement at a rate which has been funded by the actuaries of the F&PERS. Considering the high prevalence of heart disease in the population at large, the special risks placed upon firefighters, intensive testing required by the lower court will make retirement at full salary the rule instead of the exception. EEOC cannot seriously maintain this result would not significantly displace the considered policy choices of this political subdivision with respect to the terms and conditions of employment.

[6] No less than fourteen states have enacted similar legislation. *See, Colgan v. Board of County Comm'rs*, 21 Md. App. 331 (1974), p. 339 n. 3, *aff'd* 274 Md. 193 (1975).

It is noteworthy, again in a footnote, that EEOC argues that *Pennhurst v. Halderman, supra,* is inapposite to this case because *EEOC v. Wyoming, supra,* does not involve a question of "statutory construction", although it apparently concedes that the pending appeal in *Johnson v. The Mayor of Baltimore, supra,* is nothing but an issue of statutory construction. *Johnson v. The Mayor of Baltimore, supra,* Brief for the Equal Employment Opportunity Commission in Opposition at p. 9. EEOC apparently argues that it is not constitutionally infirm for it to require political subdivisions to undergo strict scrutiny of their mandatory retirement provisions with respect to public safety positions, notwithstanding the fact that Congress evinced no such intention. Congress certainly could have, but did not, make findings of fact with respect to the employment practices of political subdivisions. While *amicus* recognizes that the width of legislation under Section 5 is not delimited by legislative findings, it is unseemly that Congress would have materially augmented the guidelines for judicial review of age-based legislation beyond the standard set by this Court in *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976), with not one whit of indication that it was doing so. Even the dissent in *Massachusetts v. Murgia, supra,* recognizes that, "Of course, the court is quite right in suggesting that distinctions exist . . . between the elderly and 'quasi-suspect' classes such as women or illegitimates."

At the trial level in *Johnson v. The Mayor of Baltimore, supra,* the individual plaintiffs introduced the graph reproduced in the Appendix. The graph was prepared from an article by Dr. Robert A. Bruce, et al., entitled: "Value of Maximal Exercise Tests in Risk Assessment of Primary Coronary Heart Disease Events in Healthy Men: Five Years' Experience of the Seattle Heart Watch Study" published in the *American Journal of Cardiology,* Volume 46, September, 1980, at p. 371. The study was made of 2,365 clinically healthy men who participated in exercise testing. All experts were agreed that firefighters did not

differ significantly from average individuals of the same age with respect to levels of physical conditioning. That is to say, experts from both sides agree that it was reasonable to use general population data in assessing the performance of firefighters, a group for which the little data available showed no differences from the norm, or performance *below* the norm. The Bruce study measured ten physical parameters, including age less than 55 versus age 55 or greater. Of those ten observations, only the parameter of age less than 55 was statistically significant to the 95 percent confidence level (p is less than 0.05). The graph visually demonstrates both the indication of probability as well as the remarkable step-wise increase between primary cardiac events for those less than 55 as opposed to those 55 or greater. More impressive is the parameter of cardiac death [CD or blackened part of bars], which increases approximately fivefold in the half decade between ages 50 and 55 and the half decade ages 55 to 60, and almost tenfold between the half decade 50-55 and 60-65.[7]

Specific evidence was introduced to show that sudden cardiac death was the chief source of fatal injuries sustained by firefighters. Sadly, this trend continues. The 1980 Annual Death and Injury Survey prepared by the Firefighters' Health and Safety Program, IAFF Department of Research states, "The profession of firefighting was once again plagued by death and injury. . . . Although the number of line-of-duty deaths declined for

[7] The conclusion reached by the Bruce article, and the one which was adopted by the District Court in the *Baltimore* case was that through a series of screening procedures, those at risk for primary cardiac events could be culled from the general population. This is a conclusion which exalts form over substance because even employing the testing paradigm, fewer cardiac deaths are prevented than occur spontaneously in the population reported as "safe". If one is interested in generating statistics, the paradigm is satisfactory; however, if a political subdivision is charged with the responsibility of protecting its employees and its citizens, the testing paradigm is irresponsible, unworkable, and logically flawed.

the third consecutive year, the 1980 data continues to show a substantial increase in the number of deaths due to occupationally related diseases. . . . In summary, professional firefighting remained the most hazardous occupation. For the second consecutive year, an alarming trend was found among firefighters dying from occupational diseases. . . . Heart disease was again the most common contributor to firefighter death making up 56 percent of all reported deaths." *Id.*, p. 3.

Regarding the increment in primary cardiac events reproduced in the graph above, the life-threatening and lifesaving nature of firefighting, how can it be said that the Mayor and City Council of Baltimore acted irrationally in establishing age 55 as the age at which retirement would be required for protective services? Considering that that age was chosen not as an arbitrary figure, but in response to legislative findings that employees in these professions were dying before age 60, the earliest age of retirement under the old system, how is this the result of stereotyping or some arbitrary preconceived notion? Moreover, why is it a satisfactory response for EEOC to quote legislative history making federal action "part of liberalized retirement programs", yet persuading trial courts that identical or better substantiated state and local action is "unreasonable"?

The short answer is that when EEOC uses the word "reasonable" it means what EEOC chooses it to mean, neither more nor less. Unfortunately, the meaning EEOC chooses to attribute to "reasonable" depends upon the forum. EEOC argues here that the ability of political subdivisions to deliver services will not be affected in the "slightest" by the "modest" requirements of the ADEA, because the Act does not interfere with the subdivisions' power to prescribe "reasonable" qualifications for those individuals employed to carry out state functions. Thus the ADEA did not interfere with Congress's ability to set standards for essential governmental services based on its

weighing of the employees' interest in employment balanced against public safety, and to compensate those employees accordingly. Why then is this judgment not within the sphere of the state as well? There can be no question in the *Baltimore* case of bad faith, because the Mayor and City Council reached results identical to those reached by Congress, but more than a half century earlier for general city employees and more than a decade earlier for protective services.

CONCLUSION

EEOC says that it believes the comparisons between the ADEA and other sorts of discrimination "tend to confirm" the view that age-based discrimination is "invidious". Brief of EEOC, p. 25-26. This supposition is against the weight of authority, and contrary to the very words of the legislators whom EEOC quotes. *Compare* Brief of EEOC, p. 26, n. 13 *with* 90 Harvard Law Rev. 380 (1976) *and* 113 Cong. Rec. 34742 (1967) (remarks of Rep. Burke); 57 Chicago Kent Law Review, p. 1146, n. 3.

Essentially, Wyoming and this *amicus* can show that the ADEA substantially interferes with the ability of political subdivisions to legislate benefits for its employees. This *amicus* does not predicate its position upon an inherent right to discriminate arbitrarily. It does cherish and wishes to preserve its local legislative authority over the structuring of employee benefits, of which wages and retirement benefits are but facets. It agrees with the Seventh Circuit Court of Appeals that, "The wisdom of a legislative act is not subject to judicial scrutiny. . . ." *EEOC v. Janesville*, 630 F.2d 1254 (7th Cir. 1980) at 1259. It must have been recognized by Congress that because of the inequality between the average worker and his employer, the opportunity for arbitrary discrimination in the private sector was great. But where the retirement policies of a group of employees derive from the legislative process itself, the act requires judicial comment

upon the *wisdom* of legislation. Certainly all legislation is subject to scrutiny for the "reasonableness" of its classifications. *Massachusetts v. Murgia, supra.* This *amicus* asserts that the fundamental determination of what sort of scrutiny is to be applied to legislative distinctions is a judicial one. Most important, if Congress has the power to enhance or diminish the established level of judicial scrutiny by statute Congress should be required to state unequivocally the source of constitutional authority upon which it relied. The text of the law, administrative guidelines, and cases under the ADEA provide a perfect example of how legislation is transmuted in substance by fiat. Legislative findings make it clear that Congress intended to require employers to be "reasonable". Agency regulations sought a much more restrictive test, and seized upon similar language in legislation addressed to cure invidious discrimination. The judiciary, in response to agency demands, further restricted the exceptions to the ADEA to the point that the BFOQ exception, narrow at first, was squeezed into non-existence. Until *Wyoming, supra*, the application of the ADEA was never really subjected to constitutional scrutiny because of broad presumptions of constitutionality and the eagerness of courts to find constitutional authority in the slimmest of reeds plucked from the morass of legislative history. Relying on the same scant evidence, the EEOC wishes to complete the evolution; the ADEA which originally placed reasonable burdens upon private employers is now legislation which imposes strict liability upon the legislative decisions of political subdivisions, and affords them no reasonable exception. In *Pennhurst, supra*, this Court held that laws which significantly encumber a political subdivision's freedom to legislate should be shaped by the Constitution and stated Congressional intent, and not by administrative fiat or the visionary evangelism of lower

federal courts. That principle should control here, and the decision of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

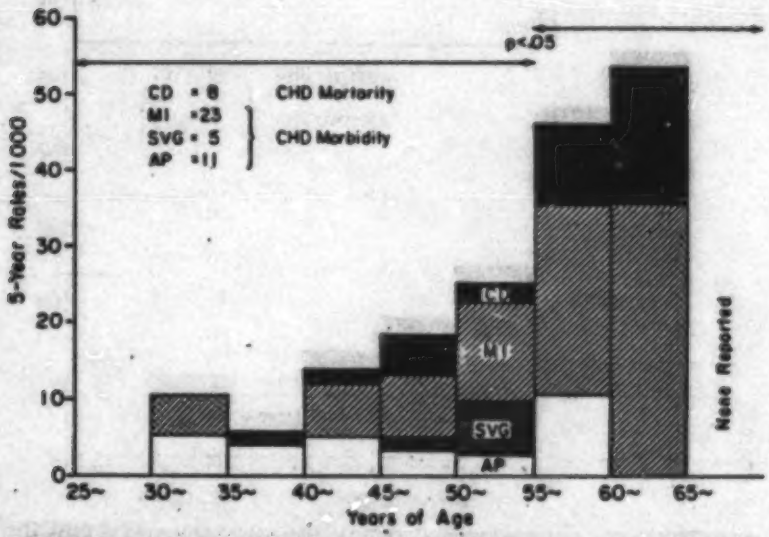

FIGURE 2. Five year rates of coronary heart disease events/1,000 men according to age at initial examination. There were no events in the small groups of persons 25 to 29 years of age and 65 to 69 years of age. AP = angina pectoris; CD = cardiac death; CHD = coronary heart disease; MI = myocardial infarction; p = probability; SVG = saphenous vein bypass grafting procedure.

Amicus Brief

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellant,

v.

STATE OF WYOMING, et al.,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

BRIEF OF THE STATES OF CALIFORNIA AND ALABAMA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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IN THE

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October Term, 1980

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

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Appellees.

BRIEF OF THE STATES OF CALIFORNIA AND ALABAMA AS AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICI CURIAE

The question presented in the instant case is a matter of continuing importance to California and Alabama, both of which, by statute, mandate the retirement of law enforcement personnel prior to age 70 years.

The California Public Employees' Retirement Law compels the retirement of civil servants classified as "safety members," most of whom are law enforcement personnel, at age 65 years. Counties and public entities within the state also provide "safety member" plans for their employees with designated law enforcement positions. These local plans likewise mandate retirement at an age of less than 70 years. The validity of these state mandatory retirement schemes has been brought into

question by reason of two California federal district court cases brought against the State by the Equal Employment Opportunity Commission under the federal Age Discrimination in Employment Act of 1967 (ADEA).[1] The decision in the case at hand will directly impact the resolution of those actions and the continuing ability of the amici states to structure the terms of employment for law enforcement personnel.

SUMMARY OF ARGUMENT

In 1967, under its power to regulate interstate commerce, Congress enacted the ADEA and by a further exercise of that same power, extended the Act to the states in 1974 under amendments to the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C., §§ 201, et seq.). Amici states respectfully submit that application of the Act against a state to prohibit compulsory retirement of its law enforcement personnel before the age of 70 years violates the Tenth Amendment to the United States Constitution under the standards established by this court in *National League of Cities* v. *Usery* (1976) 426 U.S. 833.

Extension of the ADEA to the states could not be sustained, alternatively, on the basis of Congress' Fourteenth Amendment power, for the ADEA is not "appropriate legislation" to "enforce" the provisions of that Amendment. (*Oregon* v. *Mitchell* (1970) 400 U.S. 112.)

[1] 29 U.S.C., §§ 621, et seq. (ADEA).

ARGUMENT

I

THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BARS APPLICATION OF THE ADEA TO INVALIDATE A STATE SYSTEM FOR RETIREMENT OF LAW ENFORCEMENT PERSONNEL

A. The Constitutional Predicate of the ADEA is the Commerce Clause

The language and the legislative history compel the conclusion that the ADEA was enacted pursuant to the Commerce Clause of the United States Constitution (U.S. Const., art. I, § 8, cl. 3).

As enacted in 1967 (P.L. 90–202, § 2), the ADEA provided, in part:

> "(a) The Congress hereby finds and declares that—
>
> * * *
>
> "(4) the existence in industries affecting commerce, or arbitrary discrimination in employment because of age, burdens, commerce and the free flow of goods in commerce." (29 U.S.C., § 621 (a) (4).)

The definition of "employer" to whom the ADEA initially applied was "a person engaged in an industry affecting commerce. . . ." (29 U.S.C., § 630(b).) This language signifies congressional intent to exercise the full extent of authority under the Commerce Clause. (*Walling* v. *Jacksonville Paper Co.* (1943) 317 U.S. 564; *10 East 40th Street Building* v. *Callus* (1945) 325 U.S. 578.)

Moreover, the enforcement powers, remedies, and

procedures of the ADEA were extracted by incorporation from a Commerce Clause enactment, the FLSA. (*U.S.* v. *Darby* (1941) 312 U.S. 100; *Lorillard* v. *Pons* (1978) 434 U.S. 575.)

That Congress invoked its Commerce Clause authority in amending the ADEA in 1974 is an equally ineluctable postulate.

The amendment, which extended the Act to the federal, state, and local governments, was accomplished by Public Law 93–259. Entitled, "Fair Labor Standards Amendments of 1974," Public Law 93–259 was virtually an exclusive mechanism for expansion of coverage of the FLSA to the states.

The legislative record of the 1974 amendment is replete with explicit evidence of congressional reliance upon its power to regulate commerce.

The amendment to the ADEA was viewed as ". . . a logical extension of the committee's decision to extend the FLSA coverage to Federal, State, and local government employees." (H.R.Rep. No. 93–813, 93d Cong., 2d Sess., p. 40 (1974).)

The avowed intent of the legislators was to implement the ADEA "through the exercise of . . . its power to regulate commerce among the several states and with foreign nations." (H.R.Rep. No. 93–913, 93d Cong., 2d Sess. (1974).) It was stated that "the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its powers to regulate interstate commerce." (Sen.Rep. No. 93–690, 93d Cong., 2d Sess., p. 24 (1974); 120 Cong. Rec.

5735 (daily ed. March 7, 1974).)

The report from the House Committee on Education and Labor expressly referenced *Maryland* v. *Wirtz* (1968) 392 U.S. 183, as establishing that:

> "The commerce power provides a constitutional basis for extension of the Act to State-operated schools and hospitals." (H.R.Rep. No. 93–913, 93d Cong., 2d Sess., pp. 6, 7 (1974).)

In addition, during floor debate in the House, congressional reliance on the commerce power in accordance with *Maryland* v. *Wirtz, supra,* was further underscored by the following exchange between Representative Young and Representative Dent, the Chairman of the House Committee on Education and Labor:

> "Mr. YOUNG.
>
> * * *
>
> "The question that I have for the gentleman from Pennsylvania (Mr. Dent) is under what legal interpretation do State and local employees become part of industry and under what conditions would their services affect interstate commerce?
>
> "In other words, why would it be appropriate and constitutional under the policy of this act to bring in workers who are employed in State and Federal Government?"
>
> "Mr. DENT.
>
> * * *
>
> "Mr. Chairman, I would suggest that the gentleman read page 6 of the report. In the case of Maryland, and others against Wirtz, Secretary of Labor, and others, the Supreme Court considered the contention of appellants—28 States and a school district —who sought to enjoin enforcement of the act as it

applies to schools and hospitals operated by the States for their subdivisions. That was for the minimum wage law." (120 Cong. Rec. 7337 (daily ed. March 20, 1974).)

In 1976, this court, in *National League of Cities* v. *Usery, supra,* 426 U.S. 833, overruled *Maryland* v. *Wirtz, supra,* and severely restricted the ability of Congress to exercise its Commerce Clause power against the states. In so doing, this court declined to decide whether the Tenth Amendment would also bar enactments empowered by, for example, section 5 of the Fourteenth Amendment. (*National League, supra,* 426 U.S. at 852. fn. 17.) After *Fitzpatrick* v. *Bitzer* (1976) 427 U.S. 445, resolved that Fourteenth Amendment statutes could survive such a challenge, courts were quick to seize this legal lifeline and justify enforcement of the ADEA against state and local government by ascribing to it Fourteenth Amendment origins.[2]

This fiction, employed by *Arritt* v. *Grissell* (4th Cir. 1977) 567 F.2d 1267, and its progeny, withstands neither reasonable scrutiny nor the test for ascertaining congressional intent articulated in *Pennhurst State School* v. *Halderman* (1981) 451 U.S. 1.

To build a foundation of Fourteenth Amendment powers to support the ADEA, *Arritt, supra,* and succeed-

[2] See, *Arritt* v. *Grissell* (4th Cir. 1977) 567 F.2d 1267; *E.E.O.C.* v. *County of Calumet* (E.D.Wis. 1981) 519 F.Supp. 195, *appeal docketed* No. 81-2120 (7th Cir. 1981); *E.E.O.C.* v. *Penn. Liquor Control Bd.* (M.D.Pa. 1980) 503 F.Supp. 1051; *Marshall* v. *Delaware River and Bay Authority* (D.Del. 1979) 471 F.Supp. 866, 891, fn. 7; *Remmick* v. *Barnes County* (D.N.D. 1977) 435 F.Supp. 914; *Aaron* v. *Davis* (E.D.Ark. 1976) 424 F.Supp. 1238, 1241, fn. 2.

ing cases have repeatedly advanced three indicia of congressional intent: (1) that the prohibitions of the ADEA were derived from Title VII of the Civil Rights Act (42 U.S.C., §§ 2000e, et seq., hereinafter "Title VII"); (2) that Title VII was extended to government employees in 1972 as was the ADEA in 1974; and (3) that proposals were made and rejected to include age discrimination in the Civil Rights Act, an equal protection statute.

Analogy to Title VII is unavailing. This court has previously examined the provisions of both Title VII and the ADEA and found that while there are "important similarities between the two statutes," there exist "significant differences" as well. (*Lorillard* v. *Pons, supra,* at 584.)

Secondly, the extension of Title VII to government employees in 1972 likewise discloses little if any congressional intent which bears on expansion of the ADEA to all of state government two years later. In fact, the legislative record indicates that the impetus for amending the ADEA was an extension of the FLSA to government workers, not the prior extension of Title VII:

> "The Committee recognizes that the omission of government workers from the Age Discrimination in Employment Act did not represent a conscious decision by the Congress to limit the ADEA to employment in the private sector. It reflects the fact, that in 1967, when ADEA was enacted, most government employees were outside the scope of the FLSA and the Wage Hour and Public Contracts Divisions of the Department of Labor, which enforces the Fair Labor Standards Act, were assigned responsibility for en-

forcing the Age Discrimination in Employment Act." (Sen.Rep. No. 93–690, 93d Cong., 2d Sess., p. 55; Sen. No. 2747.)

Thirdly and finally, the fact that Congress eschewed proposals in 1967 and again in 1974, to incorporate the age discrimination proscription into Title VII, an equal protection statute, indicates, if anything, an intent not to imbue the ADEA with the equal protection attributes of section 5 of the Fourteenth Amendment.[3]

Ascription of Fourteenth Amendment origins for the ADEA becomes even more untenable when examined in light of *Pennhurst State School* v. *Halderman, supra.* For the first time, this court set forth the test for determining when Congress intends to exercise its Fourteenth Amendment power. In disapproving the Third Circuit's implication of congressional exercise of that power, this court stated:

> "Although this Court has previously addressed issues going to Congress' power to secure the guarantees of the Fourteenth Amendment, [citations omitted] we have had little occasion to consider the appropriate test for determining *when* Congress intends to enforce those guarantees. *Because such legislation imposes congressional policy on a state involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.*" (Emphasis added.)

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[3] 113 Cong. Rec. 31254 (1967); H.R. 16972, 93d Cong., 2d Sess. (1974), see 120 Cong. Rec. H9782 (daily ed. Oct. 1, 1974); H.R. 17383, 93d Cong., 2d Sess. (1974), see 120 Cong. Rec. H10598 (daily ed. Oct. 15, 1974).

* * *

"There is virtually no support for the lower court's conclusion that Congress created rights and obligations pursuant to its power to enforce the Fourteenth Amendment. The Act nowhere states that that is its purpose. Quite the contrary, the Act's language and structure demonstate that it is a mere federal-state funding statute." (*Id.*, at 15.)

In the instant case, the language of the ADEA and the legislative history clearly evidence Commerce Clause origins. A contrary conclusion can be reached only in derogation of the express words of the statute and by patchworked implication.

B. Enforcement of the ADEA Against the States Impermissibly Intrudes upon State Sovereignty

The specter of federal regulation of the states' employment relationship with their law enforcement personnel offends the Tenth Amendment and poses a substantial threat to the integrity of our federal system of government. Use of the Commerce Clause in this context as a foil against the states would surely be abhorrent to the framers of the Constitution who understood the purposes of the new power to be to halt the erection of trade barriers by the states against each other and not to permit regulation of the states' own government. The states envisioned that the commerce power would be used to protect them from destroying each other commercially and not as a weapon to be used by the federal government against the states. (See *The Federalist No. 28* (Hamilton); *The Federalist No. 42* (Madison); Frank-

further, *The Commerce Clause under Marshall, Taney and Waite* (Univ. N. Car Press (1937) 12–13).)

This original intent was revitalized in *National League, supra,* wherein this court overruled the previously-sanctioned federal encroachment in *Maryland* v. *Wirtz, supra,* 392 U.S. 183, and stated:

> "*Wirtz* relied heavily on the Court's decision in *United States* v. *California,* 297 U.S. 175 (1936). The opinion quotes the following language from that case:
>
> " ' "[We] look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual." 297 U.S., at 185.' 392 U.S., at 198.
>
> "But we have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta from *United States* v. *California,* simply wrong. Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power, if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz,* allow 'the National Government [to] devour the essentials of state sovereignty,' 392 U.S., at 205, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause. While there are obvious differences

between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled." (*National League of Cities* v. *Usery, supra*, 426 U.S. 833, 854–855.)

In reaffirming the vitality of state sovereignty, the court concluded that federal incursions which operate "to significantly alter or displace the States' abilities to structure employer-employee relationships in areas of traditional governmental functions," are repugnant to the Constitution. Police protection and parks and recreation services were specifically identified as "traditional government functions." (*National League, supra,* at 851.)

The components of the *National League* test were restated in *Hodel* v. *Virginia Surface Mining and Reclamation Association* (1981) 452 U.S. 264, as follows:

> "First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' " [Citations omitted.] (*Id.*, at 287.)

Citing Mr. Justice Blackman's concurring opinion in *National League, supra,* and *Fry* v. *United States* (1975) 421 U.S. 542, *Hodel* also confirms that a state's interest is to be balanced against any supervening national interest

advanced by the regulation (*id.*, at 288, fn. 29).

It is beyond cavail that the ADEA regulates "the States qua States." The state's power to determine the wages of its employees is an attribute of sovereignty. (*National League, supra.*) The duration of the employment relationship is no less of a substantive term of employment than is the compensation to be paid. (*Marshall* v. *City of Sheboygan* (7th Cir. 1978) 577 F.2d 1, 6.) By establishing 70 years as the mininum age at which retirement can be compelled, the ADEA, in effect, determines the period of employment.

In terms of assessing the state impairment, the determinative factor is ". . . the nature of the federal action, not the ultimate economic impact on the States." (*Hodel* v. *Virginia Surface Mining and Reclamation Association, supra,* at 292, fn. 33; *National League of Cities* v. *Usery, supra,* at 851.) Nonetheless, economic impact on the states is certain. In California, government would be forced to continue law enforcement personnel on the payroll an additional 5 to 15 years. In many cases the continued salaries would be at the high end of the earning scale as well.

Further, a peace officer in California is entitled to a conclusive presumption that any heart condition he may suffer arose from his employment, thereby qualifying him for immediate disability retirement (Gov. Code, § 31720.5). To the extent that the likelihood of developing heart ailments increases with age, the state would be forced to shoulder the burden of a higher number of disability pensions. Under California's retirement for-

mula, these pensions increase in cost to the state as an employee's service credits decrease (Gov. Code, § 21292.5). Consequently, the less time on the job an older employee has, the more costly it is to the state to fund a disability retirement.

State inability to structure retirement schemes could cause an even more discrete "cost" in terms of retarding upward mobility in law enforcement positions, thereby reducing the states' ability to recruit talented men and women for those positions. Application of the ADEA to the States would also severely thwart affirmative action efforts to fill reoccurring vacancies in law enforcement positions from which minorities, women, and disabled persons have traditionally been excluded. (See, e.g., *Minnick* v. *Calif. Department of Corrections* (1981) 452 U.S. 105 involving correctional personnel.) Statistics on file in the California State Personnel Board reflect that the Board's most intensive affirmative action efforts have been aimed at law enforcement positions in the California Civil Service, all of which would be subject to earlier statutory retirement but for the ADEA. These positions include many fire supression classes, narcotic investigators, state police, fish and game wardens, and other California "peace officer" classes. Ironically, in the same stroke the ADEA will alter the regular turnover of state law enforcement personnel necessary to bring the state into compliance with Title VII.

In the area of law enforcement personnel, no supervening national interest can be advanced. The federal interest is parallel, not paramount, to the interests of the states.

The 1974 amendments expanded application of the ADEA to the federal government as well as to state and local bodies. (29 U.S.C., § 633(a).) Congressional intent to extend the same quantum of protection to government workers within federal executive agencies as that extended to other civil servants is clear:

> "S. 2747 amends the Age Discrimination in Employment Act of 1967 to include within the scope of its coverage Federal, State, and local government employees (other than elected officials and certain aides not covered by civil service), and to expand coverage from employers with 25 or more employees to employers with 20 or more employees.
>
> * * *
>
> "The Committee expects that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as it has and continues to do in private employment."

(Sen.Rep. No. 93-690, 93d Cong., 2d Sess., pp. 55, 56. See also: Statements of Sen. Bensten, 120 Cong. Rec. 5741 (daily ed. March 7, 1974); 120 Cong. Rec. 8768 (daily ed. March 28, 1974).)

However, the same Congress which amended the ADEA in 1974 lowered the established mandatory retirement age from 70 years to 55 years for *federal* law enforcement personnel and firefighters.[4]

---

[4] P.L. 93-350 included within its coverage the FBI, the Bureau of Prisons, Immigration and Naturalization, Marshals, Bureau of Narcotics and Dangerous Drugs, Naval Intelligence, Postal Inspectors, the IRS, Customs, Secret Service, and Firefighters.

In so amending the federal law enforcement retirement statutes, Congress explicitly recognized the need for comparatively young, strong, and vigorous personnel in law enforcement positions.

> "The history of retirement legislation dealing with law-enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age 50. This intent has been based on the nature of the work involved and the determination that these occupations should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service. They are occupations calling for the strength and stamina of the young rather than the middle aged. Older employees in these occupations should be encouraged to retire." (U.S. Code Cong. & Admin. News (1974), p. 3699.)

This clear congressional preference for early retirement of law enforcement personnel was recently underscored in *Stewart* v. *Smith* (D.C. Cir. 1982) 28 EPD, paragraph 32,509; 28 Fair Employment Practices Cases 374. There, the U.S. Bureau of Prisons' policy of not hiring anyone over the age of 35 years was upheld as an exception to the ADEA in furtherance of Congress' unequivocal intention to preserve a young and vigorous law enforcement work force.

Consequently, there can be no supervening national interest to prohibit compulsory retirement by the states of law enforcement personnel prior to age 70 years.

Moreover, even if a paramount federal interest exist-

ed, the degree of intrusion resulting from the proposed regulation is intolerable. The case at hand shares nothing in common with *Fry, supra,* where Congress asserted its commerce power to curb runaway inflation, a national emergency, by extreme but only temporary wage and price controls over the activities of state governments. The ADEA is not a temporary measure necessitated by a national emergency. Nor, as discussed earlier, would it operate beneficially upon the states by reducing pressures on state budgets, as did the Economic Stabilization Act of 1970.

The impact of the ADEA upon the states is direct and costly. It strikes at the heart of the states' ability to structure the period of, and the compensation attendant to, civil service employment in law enforcement categories.

II

EXTENSION OF THE ADEA TO STATE AND LOCAL GOVERNMENTS IS NOT WITHIN THE AMBIT OF CONGRESSIONAL POWER PURSUANT TO THE FOURTEENTH AMENDMENT

If, as is claimed by the *Arritt* line of authority, the ADEA was extended to the states pursuant to section 5 of the Fourteenth Amendment, the proposed application would exceed Congress' power.

By its terms, section 5 of the Fourteenth Amendment vests Congress with the "power to enforce, by appropriate legislation, the provisions of this article."

It appears that the provision of the Fourteenth

Amendment which the ADEA endeavors to enforce is the Equal Protection Clause. (*Arritt, supra,* 567 F.2d 1267, at 1270–1271; *Aaron* v. *Davis, supra,* 424 F.Supp. 1238, 1241; *Usery* v. *Bd. of Salt Lake City* (D.Utah 1976) 421 F.Supp. 718.)

However, classifications based upon age are not encompassed within the Equal Protection Clause. (*Oregon* v. *Mitchell, supra,* 400 U.S. 112.) Congress, therefore, could not utilize the Fourteenth Amendment to compel state adherence to certain age standards.

To the extent that discrimination based upon age may be properly proscribed by the Fourteenth Amendment,[5] the ADEA is not the appropriate vehicle because it only protects persons between the ages of 40 and 70 years. By so limiting the group ostensibly protected, the ADEA, in effect, sanctions age discrimination against individuals who are less than 40 and older than 70 years of age. The Fourteenth Amendment power may not be exercised to enforce laws which authorize violations of that Amendment. (*Katzenbach* v. *Morgan* (1966) 384 U.S. 641, 651, fn. 10; *Shapiro* v. *Thompson* (1969) 394 U.S. 618.)

CONCLUSION

The ADEA was a product of Commerce Clause authority and its application against state retirement systems for law enforcement personnel violates the Tenth Amendment.

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[5] In *Massachusetts* v. *Murgia* (1976) 427 U.S. 307, this court employed a traditional equal protection test in analyzing and upholding a state law mandating retirement of law enforcement personnel at age 50 years.

* * *

For the foregoing reasons, the opinion of the United States District Court should be affirmed.

DATED:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellant,

v.

STATE OF WYOMING, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

BRIEF OF AMICI CURIAE THE COUNTY OF MARATHON, WISCONSIN, THE NATIONAL ASSOCIATION OF COUNTIES AND THE WISCONSIN COUNTY BOARDS' ASSOCIATION IN SUPPORT OF THE BRIEF OF APPELLEES

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QUESTION PRESENTED

Whether Congress violated the Tenth Amendment when it amended Section 11(b) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 630(b), to include state and local government employers within the coverage of the Act.

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IN THE

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OCTOBER TERM, 1981

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellant,

v.

STATE OF WYOMING, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

BRIEF OF AMICI CURIAE IN SUPPORT OF THE STATE OF WYOMING, et al.

INTEREST OF THE *AMICI CURIAE*

Your *amici* are Marathon County, Wisconsin,[1] the National Association of Counties and the Wisconsin County Boards' Association. These *amici* share a common interest in the instant case. County governments throughout this nation are traditionally charged with the obligation to provide a wide variety of protective services for their citizens.

An integral part of each county's protective service obligation encompasses responsibility for personnel policies relative to wages, hours and conditions of employment. Retirement policies are critical conditions of employment. Policies as to mandatory retirement are of primary importance in maintaining a vigorous force and providing the highest quality of protective services. The effective delivery of protective services by county governments across this nation will be affected by the Court's decision in this case.

Marathon County, with a population of approximately 111,000, is located in north-central Wisconsin. The County's elected Board of Supervisors derives its power and authority from the relevant laws of the State of Wisconsin. Section 41.02(23), Wis. Stats., sets forth the normal retirement age for general public employees at 65.

[1] Similar to the instant case, the Equal Employment Opportunity Commission (EEOC) has challenged the application of Marathon County's retirement policy as a violation of the Age Discrimination in Employment Act (ADEA). One of several affirmative defenses raised by Marathon County is the unconstitutionality of the ADEA as applied to state and local protective service personnel. This case is currently pending in the U.S. District Court for the Western District of Wisconsin and has been stayed pending the ultimate determination in *EEOC v. Wyoming. EEOC v. Marathon County*, No. 79-C-559 (W.D. Wis. filed Dec. 11, 1979).

However, consistent with Congress' treatment of federal law enforcement employees, the Wisconsin State Legislature has dictated the normal retirement age for protective occupation participants at 55. §41.02(23), Wis. Stats.

Furthermore, the Wisconsin Fair Employment Act's prohibition against age discrimination provides an exception for hazardous or physically dangerous work, specifically including law enforcement and firefighting. §111.32(5)(e), Wis. Stats. (1979-80) [rev. by Wis. Laws 1981, Ch. 334, creating §111.33(2)(f), eff. Aug. 4, 1982].

Consistent with the statutory mandates set forth above, Marathon County has adopted a policy of retiring law enforcement personnel at age 55. This retirement policy was enacted in large part to insure public safety for the residents of Marathon County.

The National Association of Counties (NACo) is the only national organization representing county governments in the United States. It represents 2,105 urban, suburban and rural counties across the nation.

Member counties throughout the United States employ law enforcement personnel in various capacities. Many are governed by state laws mandating retirement of law enforcement personnel at ages prior to 70. They are directly and severely impacted by the application of the ADEA requiring them to extend the retirement age for such employees to 70. The impact is felt not only in the area of reduction in the effectiveness of protective services; the impact is also economic, in terms of salary and pension contributions which have historically been premised upon the age 55 retirement mandated by most local retirement programs.

The Wisconsin County Boards' Association is a public interest group comprised of representatives from the

governing bodies of Wisconsin's 72 counties. As with Marathon County, a number of those counties rely upon early retirement policies for law enforcement personnel which are consistent with the state law and the practice of the federal government requiring retirement of protective service personnel at ages younger than 70. Accordingly, several counties and other political subdivisions of the State have already been challenged as having retirement policies in violation of the ADEA[2] and others are subject to a potential challenge.

The *amici* support affirmance by this Court of the decision of the United States District Court for the District of Wyoming.

SUMMARY OF ARGUMENT

The application of the ADEA to state and local governmental retirement policies affecting law enforcement and firefighting personnel lacks a proper source of federal constitutional authority. The ADEA encroaches upon the traditional and integral power and authority of state and local governments to make fundamental, rational and non-arbitrary employment decisions relating to the appropriate age for retirement of protective service employees consistent with such decisions made by the federal government.

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[2] *EEOC v. Marathon County, supra; EEOC v. County of Dane*, No. 80-C-578 (W.D. Wis. filed Nov. 3, 1980); County of Outagamie [notified of impending EEOC action]; *EEOC v. City of Janesville*, 630 F.2d 1254 (7th Cir. 1980); *Orzel v. City of Wauwatosa*, appeal docketed, No. 81-2564 (7th Cir. Sept. 30, 1981). See also *EEOC v. County of Calumet*, 519 F.Supp. 195 (E.D. Wis. 1981), appeal pending No. 81-2120 (7th Cir. argued Jan. 7, 1982).

The ADEA is not a valid exercise by Congress of its commerce power and violates the Tenth Amendment since it interferes with integral governmental functions of the states so as to alter or displace the states' abilities to function in a federal system. Historically, law enforcement has been an inherent function of state and local governments. Law enforcement is a hazardous occupation which requires a young and vigorous work force. There is a relationship between the natural degenerative process as a person ages and the person's ability to provide effective law enforcement services. State and local governments, like the federal government, have made rational and non-arbitrary retirement policies for protective service employees, which are supported by sound scientific authority. To force state and local governments to comply with the ADEA will materially affect the quality and availability of protective services which are required by the public.

A thorough analysis of the legislative history of the ADEA reveals a lack of any explicit congressional intent to enact it under the Fourteenth Amendment. Age is not a constitutionally protected classification like race and sex. Even assuming that the ADEA was enacted under the Fourteenth Amendment, it exceeds the constitutional limitation of "appropriate legislation." The ADEA is overly broad, arbitrary and unreasonable in its application to state and local protective service employees, while excluding federal protective service employees.

ARGUMENT

I.

THE APPLICATION OF THE ACT TO STATE AND LOCAL GOVERNMENTS ENCROACHES UPON THE LEGITIMATE POWER AND AUTHORITY OF THESE GOVERNMENTS TO ESTABLISH RETIREMENT POLICIES FOR PROTECTIVE SERVICE EMPLOYEES ON THE SAME BASIS USED BY THE FEDERAL GOVERNMENT

The arguments set forth by the EEOC throughout its brief on this appeal are premised upon characterizing what is being prohibited as "the power of state government to discriminate arbitrarily in employment on the basis of age." (Brief for the EEOC at 4, 5, 10, etc.). This characterization totally misconstrues the interest of state and local governments in this case. What is in the balance for these governmental bodies is not the power to discriminate arbitrarily, but rather the legitimate authority to make rational, non-arbitrary decisions regarding critical issues of employer/employee relations specifically relating to the appropriate age for retirement. State and local governments seek only to preserve and exercise such authority over their protective service personnel in precisely the same manner as the federal government.

Congress itself, in the legislative history of the ADEA, specifically recognized the legitimate and reasonable consideration of age as a significant factor of employment in the protective service occupations. The House Committee Report on the 1978 ADEA amendments states in pertinent part:

> It is recognized that certain mental and physical capacities may decline with age, and in some jobs with unusually high demands, *age may be considered a factor in hiring and retaining workers.*

> *For example, jobs such as some of those in air traffic control and in law enforcement and firefighting have very strict physical requirements on which the public safety depends.*[3] (Emphasis added).

Amici contend that this legitimate consideration of age as a valid employment criteria for protective service occupations is as applicable to state governments as it is to the federal government. Nevertheless, an irreconcilable and arbitrary double standard is imposed by Congress in its application of the ADEA to state and local government protective service employees contrary to the treatment rendered by Congress to their federal counterparts. The existence of this double standard was emphasized by the District Court in its decision and permeates the issue before this Court. 514 F. Supp. 595, at 597. However, the Government, in the instant case, neither acknowledges nor does it make any attempt to reconcile this dichotomy.[4]

It is most interesting that in 1974 (the same year Congress amended the ADEA to proscribe mandatory retirement of state law enforcement personnel prior to age 70), Congress enacted Pub.L. No. 93-350, 88 Stat. 355 (1974), a major piece of legislation designed to enhance the "youth and vigor" of federal law enforcement personnel. The mandatory retirement provisions of this law provide for the involuntary retirement of federal law enforcement officers and firefighters at age 55.[5] The Committee report supporting this legislation once again emphasizes the importance of age in the protective service occupations:

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[3] H.R. Doc. No. 527 (Pt. 1), 95th Cong., 1st Sess. (1977).

[4] A recent case relied upon by the EEOC similarly bypasses this incongruous double standard without comment. *EEOC v. Elrod*, No. 80-2810 (7th Cir. Mar. 16, 1982).

[5] 5 U.S.C. §8335(b) (1980).

> The history of retirement legislation dealing with law enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age 50. *This intent has been based on the nature of the determination that these occupations should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service.* They are occupations calling for the strength and stamina of the young rather than the middle-aged.[6] (Emphasis added).

The interest and concerns of state and local government in providing effective law enforcement and protective services are no less critical than those of the federal government. Likewise, the decision of state and local governments to mandate the retirement of protective service employees at ages younger than 70 is no more arbitrary than similar legislation by the federal government. It is ironic that the federal government now argues that this activity on the part of state and local governments constitutes "arbitrary discrimination", when, indeed, the same federal government has diligently defended precisely the same activity on the part of the federal government as rational and reasonable. The propriety of the federal government's retirement policies has consistently been upheld. *Vance v. Bradley*, 440 U.S. 93 (1979); *Thomas v. U.S. Postal Inspection Service*, 647 F.2d 1035 (10th Cir. 1981); *Stewart v. Smith*, No. 80-1340 (D.C. Cir. Mar. 9, 1982).

In *Vance v. Bradley, supra*, this Court held the mandatory retirement of federal foreign service agents at age 60 to be "rationally related" to furthering a

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[6] S.Rep. No. 948, 93rd Cong., 2nd Sess. 1, reprinted in 1974 U.S. Code Cong. & Ad. News 3699.

legitimate governmental interest and noted that the Government had argued:

> . . . the Foreign Service involves extended overseas duty under difficult and often hazardous conditions and that the wear and tear on members of this corps is such that there comes a time when these posts should be filled by younger persons. Mandatory retirement, it is said, minimizes the risk of less than superior performance by reason of poor health or loss of vitality. 440 U.S. at 103-104.

In its decision this Court highlighted the District Court's mischaracterization of the underlying purpose of the legislation in question. The mischaracterization is similar to that proposed by the EEOC in the instant case.

> . . . *we think that the District Court mischaracterized the purpose of §632 and the manner in which it operates.* Congress was intent not on rewarding youth *qua* youth, but on stimulating the highest performance in the ranks of the Foreign Service by assuring that opportunities for promotion would be available despite limits on the number of personnel classes and on the number of positions in the Service. *Aiming at superior achievement can hardly be characterized as illegitimate, and it is equally untenable to suggest that providing promotion opportunities through the selection-out process and through early retirement does not play an acceptable role in the process.* 440 U.S. at 100-101 (emphasis added).

Separate and apart from the egregious double standard the federal government seeks to impose upon state and local governments, there is independent support through the histories of state legislation as to the rational basis underlying state and local government retirement policies. Section 41.02(23) of the Wisconsin Statutes sets the normal retirement age for protective occupation participants at 55. This legislation was enacted after considerable study and was based upon the

good faith judgment of the State Legislature, acknowledging statistics that the aging process requires employees in protective service occupations to retire at age 55.

In 1962, the State of Wisconsin commenced a series of studies[7] regarding its retirement program and the effects of this program on the protective service occupations. This major undertaking reviewed cost factors, various classifications of protective service personnel and other criteria to be considered by the legislature and local governments in dealing with appropriate retirement ages. With regard to the aging process, the study reported in 1962:

> The public interest required that employees whose duties relate directly to public safety should possess the necessary mental and physical skills to cope with any type of emergency situation. *Failure to maintain high standards in this regard is to subject the public, as well as other employees, to unwarranted danger.* In certain other occupational areas, the primary danger is that the employee himself will fall victim to his own physical and mental limitations. . . . most newer retirement systems have evolved a benefit program under which the normal retirement age for any occupational group is the age at which the efficiency of the average member of the group has deteriorated to the point that the public interest is jeopardized. (Emphasis added).[8]

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[7] See Appendix A for listing of studies.

[8] An Analysis of Retirement Provisions and Related Benefit Programs for Members of the Wisconsin Retirement Fund Who Are Employed in the Protective Occupations, with Special Emphasis on the Supplemental Deposit Program Provided for by S. 66.904(1)(a)1.d, Staff Report No. I-1962, Retirement Research Council (1962).

A 1967 report states:

> These employees must be able to undergo great mental and physical strain on occasion. Law enforcement and fire fighting, as well as associated employment is definitely a younger man's occupation. *As an individual grows older he is no longer able to perform duties requiring great physical endurance in the same manner as when he was younger.* For this reason retirement systems throughout the country have recognized this as a problem and have provided for mandatory retirement of these employees at an earlier age and fewer years of creditable service than for general members.[9] (Emphasis added).

These types of considerations are repeated throughout the series of reports from 1962 through 1978 and provide the rational support underlying §41.02(23), Wis. Stats.

Additionally, there are numerous scientific studies, many of which are discussed at pages 18 through 20 of this brief, which fully support the fact that physical and mental capabilities, especially in the protective service occupations, diminish with age.

State and local retirement policies are not the result of arbitrary discrimination but rather are based on objective reasoning and good faith judgment consistent with that of the federal government, and fully supported by relevant case law, legislative histories and scientific studies.

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[9] A Study of Normal Retirement Ages and Normal Years of Service Required of Protective Occupation Participants (WRF), as Compared With the Norm Utilized by Other Police and Fire Systems Throughout the United States, Staff Report No. 15, Retirement Research Committee (1967).

II.

THE ACT IS NOT A VALID EXERCISE OF CONGRESS' COMMERCE POWER AND CONTRAVENES THE TENTH AMENDMENT

In the instant case, there is no dispute that the ADEA and specifically §11(b) of the ADEA, 29 U.S.C. §630(b), applying coverage of the Act to state and local government employers, was enacted pursuant to Congress' powers under the Commerce Clause. The EEOC has affirmatively argued that:

> The Act is a Valid Exercise of Congress' Commerce Power and does not Contravene the Tenth Amendment. (Brief for the EEOC at 6, 7 and 23.)

Thus, the threshold issue to be addressed is whether Congress has impaired, altered, or displaced state policies or functions essential to their separate and independent existence in the federal system.

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that the 1974 Amendments to the Fair Labor Standards Act (FLSA), which extended minimum wage, overtime and maximum hour provisions to state and local governments, violated the Tenth Amendment. The provisions were found to impermissibly interfere with integral governmental functions of the states so as to alter or displace the states' abilities to function in a federal system. As in the instant case, *National League of Cities* involved the states' critical ability to structure employer-employee relations.

The holding in *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), sets forth the three prerequisites to establishing a Tenth Amendment violation of the type found in *National League of Cities*:

> First, there must be a showing that the challenged statute regulates the "States as States". (Citation omitted) Second, the federal regulation must address matters that are indisputedly "attributes of state sovereignty". (Citation omitted) And third, it must be apparent that States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." (Citation omitted) *Id.* at 284.

The EEOC concedes that the application of the ADEA to the Wyoming Game and Fish Department does, indeed, regulate the state as a state and that wildlife management is a traditional governmental function. (Brief for the EEOC at 9.) Likewise, *amici* maintain that all law enforcement and protective service functions are primary, basic and traditional functions of state and local government. Indeed, in *National League of Cities*, Justice Rehnquist said of the FLSA Amendments:

> . . . This application will nonetheless significantly alter or displace the states' abilities to *structure employer-employee relationships* in such areas as *fire prevention, police protection*, sanitation, public health . . . *Indeed, it is functions such as these which . . . the States have traditionally afforded their citizens. Supra*, at 851 (emphasis added).

The only dispute raised by the EEOC with regard to the state's satisfaction of the three-pronged test rests with the issues of state sovereignty and the adverse impact of the ADEA on these traditional, integral government services.

A. The Establishment Of Wages, Hours And Conditions Of Employment By State And Local Governments For Protective Service Personnel Is An Attribute Of State Sovereignty

The ADEA, as applied to state and local protective service employees, interferes with the sovereign and integral functions of local government in violation of the

well recognized principles of federalism established by this Court in *M'Culloch v. Maryland*, 4 U.S. (4 Wheat.) 414 (1819).

The structuring of services relating to law enforcement has traditionally been the responsibility of the states. *National League of Cities, supra*, at 851. The establishment of policies and standards regarding the retirement of employees are fundamental conditions of employment. *Alabama Power Co. v. Davis*, 431 U.S. 581, 592-3 (1977); *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 180 (1971); *Inland Steel Co. v. National Labor Relations Board*, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949), reh'g denied, 339 U.S. 990 (1950). Such decisions are as fundamental to the structure of the employer/employee relationship as the establishment of wages and hours by local governments recognized in *National League of Cities.*

This Court in *National League of Cities* emphasized the significance of state sovereignty with regard to fundamental employment decisions:

> If Congress may withdraw from the States the authority to make those *fundamental employment decisions* upon which their systems for performance of these functions must rest, we think there would be little left to the states' '*separate and independent existence*'. 426 U.S. at 851. (Footnote omitted; emphasis added) [Quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911)].

To permit Congress to dictate the age of retirement for local law enforcement employees (in a manner directly contrary to that exercised by the federal government) is violative of basic tenets of federalism and defies the essence of state sovereignty.

B. Forcing State And Local Governments To Comply With The ADEA Will Have A Dramatic Impact On The Quality And Availability Of Traditional State And Local Services

Law enforcement and public protection have always been a traditional and integral aspect of state and local government. (Brief for the EEOC at 9.) In many areas of the country this fundamental function has been provided by the sheriff and his deputized staff. In Wisconsin, the position of sheriff for each of its counties was provided for by enactment of the Wisconsin Constitution in 1848.[10] Historically, the roots of the law enforcement function of the sheriff have been traced to 9th Century England.[11]

In our federal system of government, the providing of law enforcement services has been recognized primarily as a state and local function. The President's Commission on Law Enforcement and Administration of Justice specifically noted:

> The States have the primary constitutional responsibility for maintaining order within their boundaries, and all of the States have exercised this authority by enacting broad criminal codes. *But because local police departments have traditionally maintained law and order within their jurisdictions and because thousands of violations occur daily in all parts of States, the responsibility for preventing crime has been delegated by States to the local governments in which the violation occurs.*[12] (Emphasis added).

The Commission also observed:

> Because the concept of local autonomy in enforcing laws has prevailed throughout our history and be-

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[10] Wisconsin Constitution, Article VI, Section 4.

[11] *Task Force Report: The Police*, The President's Commission on Law Enforcement and Administration of Justice, 3 (1967); *The World Book Encyclopedia* 17, 323 (1975).

[12] *Task Force Report: The Police*, *supra* at 8.

> cause the many policing agencies have held firmly to their traditional jurisdictional authority, responsibility for maintaining public order is today extremely decentralized.[13]

The vast majority of personnel and financial resources committed to public protection and law enforcement are at the state and local levels of government as opposed to the federal level of government.[14] The provision of law enforcement services involves the expenditure of substantial financial resources.[15] In an era of limited public revenue, the provision of such services must be done at an affordable cost to the taxpayers.[16] The personnel costs involved include, in part, not only wages and the employer social security contribution but also health insurance, disability benefits and accelerated retirement contributions in order to provide the same benefit level as other employees at an earlier age.[17] Deferring manda-

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[13] *Id.* at 7.

[14] *Task Force Report: The Police, supra*, Table 1, at 7; *The State of Wisconsin 1979-1980 Blue Book, supra*, Figure 51, at 248.

[15] The total number of individuals employed in protective occupations in the State of Wisconsin during 1979 was 10,910 with total annual earnings of 181 million dollars. The Report of the December 31, 1979 Actuarial Valuation of the Wisconsin Retirement Fund, Gabriel, Roeder, Smith & Company (1979).

[16] In 1981, Marathon County, Wisconsin employed a sheriff and 62 full-time deputy sheriffs. The public safety category of its budget allocated $2,259,625.00, constituting 8% of the entire budget. 1981 Budget Marathon County, Ordinance 106-80 (1980).

In 1977 all Wisconsin counties spent $68.7 million for law enforcement. "County Law Enforcement," *The Wisconsin Taxpayer*, vol. 46, no. 11, at 1, (Nov. 1978).

[17] In Wisconsin, for example, the employer's contribution rate for protective occupation employees in 1981 was 14.7% of the employee's earnings. Typically, as a result of collective bargaining, the employer contributed, in addition, the em-

(Footnote continued on following page)

tory retirement to age 70 will dramatically increase direct personnel costs by imposing higher wage levels due to longevity, as well as increased costs of health, disability and life insurance fringe benefits.[18]

The imposition of the ADEA also impacts on the effective delivery of protective services. The public rightfully has high expectations concerning the responsibilities of its law enforcement personnel.[19] As is necessary, law enforcement personnel function in a wide variety of activities including fighting crime, traffic control, settling of disputes between persons, resolving nuisances, assisting persons, maintaining peace, responding to domestic problems, stopping tavern fights, investigating narcotics violations, etc.[20]

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[17] *continued*
ployee's contribution of 6% for a total 20.7% of earnings as compared to a total of 10.6% of earnings for other employees. The Report of the December 31, 1979, Actuarial Valuation of the Wisconsin Retirement Fund, *supra*, at 6.

[18] §66.191 and §891.45, Wis. Stats.; Development of the 1974 Medical Expense Tables, 30 *Transactions, Society of Actuaries* 9 (1978); Committee on Experience under Individual Health Insurance, 1979 Report, *Transactions, Society of Actuaries*, 235-289 (1980).

[19] See: *Standards Relating to the Urban Police Function*, §1-2.2, 1-31 to 1-32, American Bar Association Project on Standards for Criminal Justice (1980).

[20] *The State of Wisconsin 1979-1980 Blue Book, supra*, at 251. See "County Law Enforcement," *supra*, at 1-3 [description of sheriff's duties in Wisconsin]. Each year law enforcement personnel are assaulted and killed in the line of duty. An average of 17 of every 100 law enforcement officers nationwide were assaulted in 1979. During the year 1979, 59,031 assaults were reported. There were nearly 22,000 personal injuries of officers resulting from assaults. In 1979, 102 local, county and state law enforcement officers were feloniously killed. Four federal officers were similarly killed. *Crime in the United States*, FBI Uniform Crime Reports, U.S. Department of Justice (Sept. 24, 1980) at 302, 309.

The need for young and vigorous law enforcement personnel was recognized by Congress when it established the retirement age for federal law enforcement officers at 55.[21]

In *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), this Court also recognized the relationship between the degenerative process as a person ages and his ability to provide effective law enforcement services. *Id.* at 315. Once a person's faculties have started to degenerate with age, he can no longer assure the public of physical preparedness when encountering the hazards of his job. *Id.* Therefore, the inability to perform his functions could effectively result in serious, adverse consequences to the personal welfare of fellow officers, community residents and property. See also *Beck v. Borough of Manheim*, 505 F.Supp. 923 (E.D. Penn. 1981). This Court recognized that employers should "remove from police service those whose fitness for uniformed work presumptively has diminished with age." *Id.* at 315.

A recent Tenth Circuit case, *Thomas v. U.S. Postal Inspection Service*, *supra*, followed the *Murgia* reasoning in upholding a Postal Service regulation which fixed the maximum age for beginning Postal Inspectors at 34 years. The *Thomas* court cited a Postal Service report to Congress which elaborated on such hazards as follows:

> Incident to the enforcement of these statutes, Postal Inspectors regularly face the hazards inherent in the investigations, detention, and apprehension of criminals. Such hazards, . . . require Inspectors to possess well-developed physical and mental reflexes, an ability to make quick, rational decisions, and the capability to ensure the physical safety of themselves and others. . . . *Id.* at 1037.

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[21] Pub.L. No. 93-350, *supra*; S.Rep. No. 948, *supra*.

If the EEOC prevails on this appeal, the makeup of state and local government law enforcement personnel will soon gravitate toward the older ages. This resultant aggregate aging within law enforcement personnel will have a dramatic negative impact on the essential protective services provided by state and local governments which citizens have come to expect.

The increase in age of law enforcement officers is exacerbated by the health consequences. The primary fact of aging is that the probability of death increases logarithmically with age.[22] For example, among white males, the mortality rate at age 30 to 34 is increased 5.9 times by age 50 to 54 and by more than 13 times at age 60 to 64.[23] The incidence of coronary heart disease in men between ages 30 to 39 years is increased three times between ages 40 to 49 years and by over five times between ages 50 to 59 years with a higher incidence of high blood pressure, coronary and other heart diseases among police and law enforcement officers.[24]

It has been scientifically reported that:

> . . . There is universal agreement that there are times when on-the-job physical requirements are extremely high and that the patrol officer has to be capable of performing these physical feats when the occasion arises. Yet, available indicators point to the generalization that after the completion of recruit training, individual police officers show little initiative to keep themselves prepared to

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[22] N.S. Shock, Cardiac Performance and Age, *Cardiovascular Problems*, 3-24 (1976).

[23] *Id.*; J.H. Hall and J.D. Zwemer, *Prospective Medicine* (1979).

[24] G.A. Diamond and J.S. Forrester, Analysis of Probability as an Aid in the Clinical Diagnosis of Coronary Artery Disease, 300 *New Engl. J. Med.* 1350-1358 (1979); Actuarial Studies, *1967 Occupation Study*, Society of Actuaries (1967).

perform the varied physical requirements of the job.[25]

A large body of scientific knowledge verifies that vision, hearing, sensation, cognition, memory, speed of response, information processing, learning and problem solving are all seriously impaired with increasing age. There is also abundant scientific knowledge that with increasing age, there is also a pronounced decrease in the ability of the body to respond to practically all types of stress including occupational stress, gravitational stress, cold, dynamic and static exercise, hemorrhage and trauma.[26]

The ADEA mandated increased age of state and local officers substantially impacts the preparedness and ability of law enforcement personnel to safely and effectively respond to critical and emergency situations.[27]

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[25] M.L. Pollock, L.R. Gettman, C.S. Price and D.A. Kent, *Physical Fitness Programs for Law Enforcement Officers: A Manual for Police Administrators*, xviii, (1978).

A survey of three groups of Texas police officers found that middle-aged police officers (36 to 52 years of age) were below the levels of the average American sedentary population of similar age in working capacity, cardiorespiratory fitness and body composition values. The officers of this group, therefore, carried a higher-than-average age risk of coronary heart disease. M.L. Pollock, L.R. Gettman and B.U. Meyer, *Analysis of Physical Fitness and Coronary Heart Disease Risk of Dallas Area Police Officers*, 20 *J. Occup. Med.* 393 (1978).

[26] For enumeration of scientific authority see Appendix B.

[27] Alternatives of establishing physical fitness programs have not been very successful in improving the physical fitness status of either police officers or the general male population. M.L. Pollock and D.H. Schmidt, *Heart Disease and Rehabilitation*, 367, 525, 620, 686 (1979); M.L. Pollock, et al., *Physical Fitness Programs for Law Enforcement Officers*, *supra*, 105-107. The establishment of job validation and annual administration of medical, psychiatric and physical fitness testing of a necessarily sophisticated nature imposes extensive additional expenses on state and local governments. *Id.* at 198-202.

Thus, law enforcement services will be seriously compromised to the detriment of the public including innocent bystanders, co-workers and the officers themselves. This is a probability which Congress has sought to avoid with respect to federal law enforcement officers by exempting them from the ADEA.[28]

The imposition of the ADEA will also directly impact the internal personnel management of law enforcement forces. Due to the vagaries as to actual retirement dates, personnel administrators will no longer be able to plan to promptly fill vacancies by scheduling of merit selection processes and required training programs.

The availability of the bona fide occupational qualification (BFOQ) exemption, 29 U.S.C. §623(f), is of little solace to state and local governments faced with the high costs of attorneys' fees, expenses of expert consultants and witnesses in police science, cardiology, physiology, exercise physiology, psychology and psychiatry and other litigative expenses. Litigation of a BFOQ claim for all law enforcement officers in a department or as to each position and as to each personnel action also diverts valuable law enforcement, supervisory and management personnel from their normal duties and responsibilities. Compare *EEOC v. City of Janesville, supra*, and *EEOC v. City of St. Paul*, 500 F.Supp. 1135 (D. Minn., 3rd Div. 1980), aff'd, 651 F.2d 1162 (8th Cir. 1982).

The ADEA violates the Tenth Amendment because it interferes with the sovereign and integral functions of local government in violation of the principles of federalism set forth in *National League of Cities, supra* at 852.

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[28] 5 U.S.C. §8335(b). See also *Stewart v. Smith, supra.*

III.

SINCE THE FULL LEGISLATIVE HISTORY OF THE ACT LACKS ANY EXPLICIT REFERENCE TO CONGRESSIONAL INTENT TO ENACT UNDER THE FOURTEENTH AMENDMENT, IT IS APPARENT THAT THE ADEA WAS NOT ENACTED PURSUANT TO OR FOR THE PURPOSE OF ENFORCING THE FOURTEENTH AMENDMENT

While conceding that the ADEA was enacted pursuant to the Commerce Clause, the EEOC also maintains that the Act is appropriate legislation to enforce the Fourteenth Amendment. (Brief for the EEOC at 6, 7, 21 and 23.)

A. Reliance Upon The Fourteenth Amendment As A Source Of Authority Should Only Be Established By Demonstrating The Expressly Articulated Intent Of Congress To Do So

The ADEA should not be considered to have been passed pursuant to Section 5 of the Fourteenth Amendment unless Congress explicitly stated its intent to enact under such authority. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). Just last year, this Court in *Pennhurst* analyzed the constitutionality of a law concerning the rights of developmentally disabled citizens as applied to the states. *Pennhurst* is similar to the instant case in that an attempt was made to support the constitutionality of the act in question by claiming that it was passed pursuant to Section 5 of the Fourteenth Amendment. In deciding this issue, Justice Rehnquist, speaking for a majority of this Court stated:

> In discerning congressional intent, *we necessarily turn to the possible sources of Congress' power to legislate*, namely, Congress' power to enforce the Fourteenth . . . .
>
> . . . Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, *we*

> *should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.* Our previous cases are wholly consistent with that view, since Congress in those cases expressly articulated its intent to legislate pursuant to §5. See *Katzenbach v. Morgan, supra* (intent expressly stated in the Voting Rights Act of 1965); *Oregon v. Mitchell, supra* (intent expressly stated in both the House and Senate reports of the 1972 Amendments to the Civil Rights Act of 1965). Those cases, moreover, involved statutes which simply prohibited certain kinds of state conduct. *Id.* at 15-16 (emphasis added).

Applying this principle to the *Pennhurst* facts the Court found:

> There is virtually no support for the lower court's conclusion that Congress created rights and obligations pursuant to its power to enforce the Fourteenth Amendment. *The Act nowhere states that that is its purpose. Id.* at 18 (emphasis added).[29]

The *Pennhurst* holding precludes a casual reliance upon legislative history to imply that Congress intended to legislate pursuant to the Fourteenth Amendment.

The EEOC attempts to diminish the significance of *Pennhurst* by relegating it to a footnote (Brief for the EEOC at 22, ft 11) and asserting its non-applicability to the instant case. Similarly, in an apparent attempt to avoid the significance of *Pennhurst*, the Court of Appeals in *Elrod* merely distinguishes *Pennhurst* in a footnote as follows:

> First, the Court in *Pennhurst* was resolving an issue of statutory construction, not, as here, a question of congressional authority to legislate. All of the dicta on the Fourteenth Amendment are clearly couched

[29] It is pertinent to note, the Seventh Circuit in *Elrod, supra*, at 4, 5, 6 and 12, concludes that the ADEA lacks any explicit reference to the Fourteenth Amendment.

> in terms of that focus. Second, the case before us is one where the Court has suggested that closer scrutiny of congressional motives is unnecessary: here, the statute merely prohibits conduct and imposes no affirmative obligations on the states. Finally, we note that *Pennhurst* never suggests that a statute could not survive such close scrutiny and expressly states that the question is not reached in regard to the statute at issue in *Pennhurst. Id.* at 1539 n. 12. *EEOC v. Elrod, supra,* at 13, ft 8.

This attempt to distinguish *Pennhurst* is clearly refuted by a careful review of the decision in its full context.

First, the Seventh Circuit states that *Pennhurst* did not address "as here, a question of congressional authority to legislate." This Court, in *Pennhurst* did, indeed, analyze the appropriate source of congressional authority in order to interpret congressional intent in the construction of the statute.

> In discerning congressional intent, we *necessarily turn to the possible sources of Congress' power to legislate . . . Pennhurst, supra,* at 15.

Based upon its analysis, this Court concluded that Congress had not acted pursuant to its power to enforce the Fourteenth Amendment. *Id.* at 18.

Second, nowhere in *Pennhurst* does the Court suggest it is *unnecessary* to find explicit intent where a statute merely prohibits conduct. Rather, when read in full context, it is clear that statutes prohibiting conduct and statutes creating affirmative obligation are *both* reviewed for articulated intent. Although "[t]he case for inferring intent is at its weakest . . ." (*Id.* at 16) with statutes creating an affirmative obligation, there still remains the essential need to ascertain an articulated congressional intent under the Fourteenth Amendment for statutes that prohibit conduct.

Finally, it is true that *Pennhurst*, in footnote 12 (*Id.* at 16), does not conclude that a statute could not survive close scrutiny. However, footnote 12 involves a question of a constitutional challenge to the substance of the legislation *not* a question as to the appropriate source of power. Despite a diligent attempt to do so, the Court in *Elrod* fails to successfully undercut the significance and applicability of *Pennhurst*.

Based on the principle recently clarified and reaffirmed in *Pennhurst* a vague or indefinite reference to the Fourteenth Amendment should no longer be relied upon as precedent for the proposition that the ADEA was passed pursuant to or to enforce the Fourteenth Amendment.

B. The Legislative History Of The ADEA Is Without The Expressed Articulation Of Congressional Intent To Enact Pursuant To The Fourteenth Amendment

A thorough examination of the entire legislative history of the ADEA fails to reveal any explicit reference of congressional intent to enact the legislation pursuant to the Fourteenth Amendment. *EEOC v. Elrod, supra*, at 4, 5, 6 and 12. To the contrary, on three separate and distinct occasions Congress has had the opportunity to add the classification of "age" to the Civil Rights Act of 1964 and on each occasion, Congress did not expand this Fourteenth Amendment legislation to include age. A review of the course of this legislative history shows that Congress' failure to incorporate age into Title VII was not an oversight.[30] Rather, the

[30] In 1964, it was suggested that age be included as a protected classification when Title VII was under consideration as part of the Civil Rights Act of 1964. *EEOC v. Elrod, supra*, at 7, (citing: Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment, 47 S.Cal.L.Rev. 1311, 1328 (1974)). See also: The Age Discrimi-

(Footnote continued on following page)

prohibition against age discrimination was specifically enacted by Congress under an entirely separate statute (ADEA) adopted as an amendment to the FLSA of 1972. Thereafter, each and every amendment to the ADEA has been enacted pursuant to the FLSA. This congressional inaction to incorporate age under Title VII of the Civil Rights Act of 1964 provides conclusive evidence that Congress' prohibition against age discrimination is not founded on its power under the Fourteenth Amendment.

The analysis of the legislative history of the ADEA in *Elrod* is inapposite. *EEOC v. Elrod, supra,* at 3-15. The court repeatedly admits that the legislative history of the ADEA lacks explicit reference to the Fourteenth Amendment. *Id.* at 4, 5, 6 and 12. The court attempts to distinguish *Pennhurst*; finds the purpose of the ADEA,

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[30] *continued*
nation in Employment Act of 1967, 90 Harv.L.Rev. 380, 381 (1976). While Congress did not include age in the prohibitions of Title VII, §715 of the Civil Rights Act of 1964 directed the Secretary of Labor to study age discrimination and to submit appropriate legislative recommendations. 42 U.S.C. §2000e-14; H.R. Rep. No. 805, 90th Cong., 1st Sess., reprinted in 1967 U.S. Code Cong. & Ad. News 2213, 2214. Subsequently, as the EEOC correctly states in its brief:

> Congress first considered extending the Age Discrimination in Employment Act to cover state and local government employers in 1972, when it amended Title VII of the Civil Rights Act of 1964 to cover state and local government employers. (Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §2(f), 86 Stat. 103 (1972) (current version at 42 U.S.C. §2000e(f).) (Brief for the EEOC at 23).

What the EEOC fails to state is that this attempt to extend the ADEA to government employees was not successful. Only two months later, in May of 1972, Senator Bentsen again proposed amending the ADEA to apply to state and local governments. 118 Cong. Rec. 15894 (1972) Likewise, this attempt also failed. It was not until 1974 when the legislation was proposed as part of the FLSA that Congress extended coverage of the ADEA to state and local governments.

like that of Title VII, is to prohibit arbitrary discrimination; and draws the bald conclusion that since Title VII was explicitly passed under the Fourteenth Amendment, so too must the ADEA. The court ignores Congress' failure to directly deal with the ADEA under Title VII despite repeated opportunity to do so. More significantly, the court ignores the fact that the Act and all amendments were enacted as part of the FLSA.

Despite repeated opportunities to do so, Congress has not expressly articulated its intent to legislate pursuant to Section 5 of the Fourteenth Amendment, and according to the *Pennhurst* decision, an unstated intent to so act cannot now be attributed to Congress.

IV.

ASSUMING, *ARGUENDO*, THAT THE ADEA WAS ENACTED PURSUANT TO THE FOURTEENTH AMENDMENT, THE ACT EXCEEDS THE CONSTITUTIONAL LIMITATIONS RECOGNIZED UNDER THE FOURTEENTH AMENDMENT

Assuming, *arguendo*, that a specific congressional reference to its reliance upon the Fourteenth Amendment could be found in the legislative history of the ADEA, in applying this Act to state and local government protective service personnel, Congress has clearly exceeded the limitations of its constitutional authority.[31]

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[31] A critical infirmity of the decision in *Elrod* is the failure of the court to address or analyze this issue. Once the court reasons that the Act was enacted pursuant to §5 of the Fourteenth Amendment, *supra*, at 14, without the barest elaboration, it simply concludes that:

> The 1974 amendment is "appropriate legislation" under §5 of the Fourteenth Amendment. *Id.*

A. Unlike Sex And Race, Age Is Not A Suspect Classification And Therefore Does Not Have The Same Degree Of Constitutional Protection

In analyzing the constitutionality of an enactment pursuant to the Equal Protection Clause of the Fourteenth Amendment, this Court has adopted a two-pronged test. If the legislation affects a suspect class, such legislation is subject to strict scrutiny. However, where a suspect class is not involved, a rational basis standard is applied. *Massachusetts Board of Retirement v. Murgia, supra,* at 312, 314.

It is well established that adverse treatment based upon an individual's race or sex violates such person's basic constitutional rights under the Fourteenth Amendment as suspect classifications. Suspect classes are recognized as those:

> . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 28 (1973), reh'g denied 411 U.S. 959 (1973).

However, no citizen has a constitutional right to public employment in the first instance. *Massachusetts Board of Retirement v. Murgia, supra,* at 313. More specifically, no public employee of a state or local government has a constitutional right to continued employment beyond a normal retirement date. This Court has stated unequivocally that age is not a suspect classification. *Massachusetts Board of Retirement v. Murgia, supra* at 313-314; *Vance v. Bradley, supra* at 96-97.

The EEOC has not cited any case law holding, or even suggesting, that the right to work to any particular age is a constitutional right under the Fourteenth Amendment. To permit Congress to arbitrarily dictate to state

and local governments when they may or may not retire employees would create a new suspect classification through legislative fiat. That result would be in direct conflict with the holding of this Court in *Murgia, supra*, at 313-314.

B. The Application Of The ADEA, Restricting State And Local Governments From Retiring Protective Service Employees Until Age 70, Is Arbitrary, Irrational and Over-Inclusive

As delineated in Argument I at pages 5-9, Congress itself has enacted legislation relative to the involuntary retirement of federal law enforcement employees at ages younger than 70 years.[32] 5 U.S.C. §8335(b). Suffice it to reiterate, that congressional action exempting federal law enforcement agencies from the prohibition of the ADEA, while imposing such on state and local governments is arbitrary, rebuts the presumption of constitutionality and establishes that the ADEA, as it relates to law enforcement, has no rational justification for its application *only* to the states and their political subdivisions.

The decisions of this and other federal courts have upheld both federal and state legislation relating to mandatory retirement of law enforcement personnel, declaring such to be a valid and rational means to further legitimate governmental interests and not in violation of the Fourteenth Amendment. *Vance v. Bradley, supra; Thomas v. U.S. Postal Inspection Service, supra; Massachusetts Board of Retirement v. Murgia, supra; Stewart v. Smith, supra.*

The dual standard under which the ADEA prohibits local governments from applying age qualifications

[32] The arbitrary and irreconcilable nature of this double standard has been fully elaborated upon at pages 5-9.

while permitting the federal government to do so, vividly demonstrates that reliance on such age limitations are, indeed, rational, job related and are not an arbitrary form of discrimination as maintained by the EEOC. To the contrary, Congress and the Government have provided overwhelming evidence that age limitations for public safety officers are warranted and nondiscriminatory. There is no sound basis for all-inclusive proscriptions against earlier retirement for certain classes of state and local governmental employees.

It is contrary to sound logic for the EEOC to maintain that a prohibition against the involuntary retirement of protective service employees prior to age 70 is rational when Congress, the Government and this Court have recognized such retirement prior to age 70 to be legitimate and rational.

Based upon the foregoing analysis, the *amici* urge this Court to conclude that the ADEA is over-inclusive, arbitrary and not rationally related to the legitimate goal of erradicating discrimination in employment.

Accordingly, the Act as applied to state and local government protective service employees exceeds the constitutional limitations recognized under the Fourteenth Amendment.

CONCLUSION

Your *amici* urge this Court to affirm this District Court's judgment for the reasons that; a) Congress violated the Tenth Amendment when it amended the ADEA to include state and local protective occupation employees; b) the ADEA was not enacted under the Fourteenth Amendment; and, c) in any event, the Act exceeds the constitutional limitations recognized under that amendment.

The result is dictated by our system of federalism. State and local governments must have the freedom, like the federal government, to effectively provide traditional protective services by establishing reasonable retirement policies.

Respectfully submitted,

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APPENDIX A

RETIREMENT RESEARCH COUNCIL REPORTS RELATIVE TO PROTECTIVE OCCUPATIONS 1962—1978

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Amicus Brief

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No. 81-554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

v.

WYOMING

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, STATE OF WYOMING

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IN THE

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OCTOBER TERM, 1981

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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FOR THE DISTRICT OF WYOMING

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, STATE OF WYOMING

INTEREST OF THE AMICUS CURIAE

This brief amicus curiae is filed on behalf of the more than 1600 local governments, or political subdivisions of states, that are members of the National Institute of Municipal Law Officers (NIMLO). These local governments operate NIMLO through their chief legal officer, variously called city or county attorney, corporation counsel, city solicitor or law director and other titles, with each member local government

having one vote on all actions which are cast by the organization. This brief amicus curiae is signed by the chief legal officers of NIMLO members on behalf of their own local governments and the trustees and officers of NIMLO in their official municipal capacity.

The most basic and important function of local government is to protect the lives and property of its citizens. Imposition of a Federal standard on local governments will assuredly increase the average age of public safety forces and thereby significantly impair local governments' ability to make employment decisions involving the delivery of basic police and fire protection. NIMLO is greatly concerned that an adverse ruling in this case will destroy the ability of local governments to staff their police and fire departments with individuals who are best suited to carry out their extremely difficult tasks. Local governments do not wish to retire older public safety officers because of any animus toward them; unlike discrimination based on race or sex, the requirement that public safety officers retire at an early age is directly and rationally related to the jobs they perform. Local governments wish to retire older public safety officers out of a sincere belief that young and vigorous police and firefighters can best serve the community.

Police officers and firefighters have jobs that call for physically demanding actions. The occupations often are involved in split second, life or death situations; the jobs also entail obvious psychological stresses. As this Court has previously noted, "physical ability generally declines with age." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 315 (1976). The citizens of our Nation deserve to have their lives and property protected by those individuals best able to do the job. Local governments wish to provide

their citizens with the protection they deserve. NIMLO therefore offers its views in support of affirmance.

Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

The Statement of the Case as set forth in Appellee's Motion to Affirm is adopted by the National Institute of Municipal Law Officers for purposes of this brief amicus curiae.

SUMMARY OF ARGUMENT

Enforcement of the law and fire protection are primarily functions of local government. Public safety officers are directly responsible for protecting the lives and property of the citizens of this Nation. The Age Discrimination in Employment Act (ADEA), as applied to local governments, directly impairs the ability of local governments to staff the Nation's public safety forces with those individuals best suited for the job. Such an impairment of state and local government prerogatives by the Federal government is in violation of the Tenth Amendment as interpreted in *National League of Cities v. Usery*, 426 U.S. 833 (1976). The ability of state and local governments to staff their public safety forces with the fittest individuals is undoubtedly an attribute of state sovereignty, and compelling the state and local governments to obey the constraints of the ADEA directly impairs their ability to structure integral operations in areas of traditional functions.

The Constitution prevents arbitrary discrimination based on age, *Massachusetts Board of Retirement v. Murgia, supra,* 427 U.S. 307, 312, therefore the claim that local governments will be free to arbitrarily discriminate on the basis of age if the ADEA is found here to be unconstitutional is untrue. The interest of state and local government in providing the finest police and fire protection far outweighs the Federal interest in this matter.

ARGUMENT

I. THE EXTENSION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT TO THE STATES AND THEIR POLITICAL SUBDIVISIONS IS AN UNCONSTITUTIONAL EXERCISE OF CONGRESSIONAL COMMERCE POWER UNDER THE TENTH AMENDMENT

The 1974 amendment to the Age Discrimination in Employment Act[1] (ADEA) extending coverage of the Act to state and local governments constituted a deprivation by Congress of the ability of state and local governments to make crucial decisions intimately affecting their ability to provide adequate and essential services to their citizens. Congressional power is not absolute under the Commerce Clause; the Tenth Amendment establishes that in our system of Federalism, certain functions of state and local

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[1]Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 621 *et seq.* The term employer means "a State or political subdivision of a State and any agency or instrumentality of a State or political subdivision of a State. . ."29 U.S.C. 630(b).

governments are beyond the reach of Congressional Commerce Power. *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Hodel v. Virginia Surface Mining, Inc.*, No. 79-1538 (1981). It is not a question of commerce power or discrimination but a question of how best to protect the lives and property of local residents.

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court held that state and local government employer decisions relating to the wages paid to and maximum hours worked by governmental employees could not be mandated by the Federal government. In declaring the 1974 amendments to the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*, unconstitutional as applied to state and local government, the Court declared:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. 426 U.S. at 845

Under *National League of Cities*, when Congress enacts legislation pursuant to its power under the Commerce Clause, the Tenth Amendment prevents Congress from legislating in areas which "significantly alter or displace the States' ability to structure employer-employee relationships in such areas as fire prevention (and) police protection. . . ." 426 U.S. at 851. The inquiry in this case is whether, in amending the ADEA to apply to state and local government, Congress was acting pursuant to its power under the Commerce Clause or pursuant to its power under Section Five of the Fourteenth Amendment.[2]

[2] *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), Title VII of Civil Rights Act of 1964 may be applied to the States under §5 of the Fourteenth Amendment.

This Court has previously provided guidance for determining whether the Congress was acting pursuant to its powers under the Fourteenth Amendment when Congress seeks to place intrusive burdens upon the states.

In *Pennhurst State School v. Halderman,* 451 U.S. 1 (1981), the Court declared that the test was simply to determine what Congress actually said:

> Because such legislation imposes Congressional policy on a state involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment. 451 U.S. at 16.

An examination into the language and legislative history of the ADEA and the 1974 amendment fails to reveal any stated intent by Congress to act pursuant to its authority under the Fourteenth Amendment. In fact, such an examination reveals that Congress' only stated intention was to act pursuant to its powers under the Commerce Clause.

The ADEA was originally enacted in 1967. In the Congressional Statement of Findings and Purpose accompanying the legislation, it was stated that "[t]he Congress hereby finds and declares that.... the existence in industries affecting *commerce,* of arbitrary discrimination in employment because of age, burdens *commerce* and the free flow of goods in *commerce.*" 29 U.S.C. §621 (a) (4) (emphasis added). The definition of an "employer" is "a person engaged in an industry affecting *commerce.*" 29 U.S.C. §630(a). The appropriate terminology for Congress to utilize when it intends to invoke its authority under the Commerce Clause is "in any industry affecting commerce." *Walling v. Jacksonville Paper,* 317 U.S. 564, 570 (1943). The language of the ADEA compares favorably with an

interpretation indicating that Congress was acting pursuant to its authority under the Commerce Clause. There is no similar explicit language in either the original act or the 1974 amendment indicating Congressional intent to legislate pursuant to its authority under Section Five of the Fourteenth Amendment.

In the Congressional reports accompanying the 1974 amendment to the ADEA, Congress affirmed that it was acting pursuant to its authority under the Commerce Clause. The Introductory Statement in the House Report accompanying the legislation is rife with references to Congressional power to regulate commerce:

> Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in *commerce* or in the production of goods for *commerce*, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers (1) causes *commerce* and the channels and instrumentalities of *commerce* to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens *commerce* and the free flow of goods in *commerce*; (3) constitutes an unfair method of competition in *commerce*; (4) leads to labor disputes burdening and obstructing *commerce* and the free flow of goods in *commerce*; and (5) interferes with the orderly and fair marketing of goods in *commerce*.
>
> (b) It is hereby declared to be a policy of this Act, through the exercise by Congress of its power to regulate *commerce* among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.[3] (emphasis added).

[3]H.R. Rep. No. 93-913, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 2811-2812.

While it is true that the above statement might refer only to the amendments concerning the new provisions of the Fair Labor Standards Act, no other Statement of Power and Purpose accompanies the amendment relating to the ADEA.

The Senate Report accompanying the 1974 amendment confirmed the Congress' belief that "[t]he activities of public section employers affect interstate commerce and therefore . . . Congress may regulate them pursuant to its powers to regulate interstate commerce."[4]

While there is a paucity of direct evidence to reveal under which authority Congress was acting when it amended the ADEA in 1974, what little explicit evidence there is indicates Congressional reliance to act pursuant to its authority under the Commerce Clause. There is no direct evidence of intent to legislate pursuant to its authority under Section Five of the Fourteenth Amendment as is required by *Pennhurst, supra.*

Congress could have made explicit reference to the Fourteenth Amendment if that was its intent. For example, when Congress extended the application of Title VII of the Civil Rights Act of 1964 to state and local government employers, explicit reference was made to Congressional power under Section Five of the Fourteenth Amendment.[5] The failure of Congress to mention the Fourteenth Amendment when enacting the ADEA indicates that Congress believed age discrimination to be different from race or sexual discrimination, and that a different Constitutional authority was relied upon to regulate age discrimination.

---

[4]S. Rep. No. 93-690, 93d Cong., 2d Sess. (1974), at 24.

[5]Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, Section 2(f), 86 Stat. 103, 42 U.S.C. 2000e(f). Explicit references to §5 of the 14th Amendment in H.R. Rep. No. 92-238, 92 Cong., 1st Sess. (1971) at 19; S. Rep. No. 92-415, 92 Cong., 1st Sess. (1971) at 10-11.

That Congress believed age discrimination to be on a separate legal plane from race or sexual discrimination can be demonstrated in other ways. Representative Dent, Chairman of the House Subcommittee which had jurisdiction over the ADEA, stated:

> This member of this committee does not want this legislation combined with any of the existing anti-discrimination programs which are different in nature. I don't want it confused with any other kind of discrimination. It is distinct and separate discrimination and should be recognized as such. *Hearings on H.R. 4221 before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess. (1967),* at 97 (Remarks of Representative Dent)

Another Committee member declared:

> Age discrimination is not the same as insidious discrimination based on race or creed prejudices and bigotry. Racial or religious discrimination results in non-employment because of feelings about a person unrelated to his ability to do a job. This is hardly a problem for the older job seeker. *Id.*, at 449 (Remarks of Representative Burke)

Attempts to add age discrimination to the Civil Rights Act of 1964 were unsuccessful and it was not until 1967 that the ADEA was passed. When it was finally passed, the ADEA was not made a part of the Civil Rights Act but was a distinct piece of legislation.

The enforcement powers of the ADEA were originally delegated by Congress to the Secretary of Labor, not the Equal Employment Opportunity Commission as was the case with enforcement of the Civil Rights Acts. It was not until 1980, and then only by an Executive Order, that enforcement of the provisions of the ADEA was transferred

to the EEOC.[6] This further demonstrates that Congress was acting pursuant to its powers under the Commerce Clause when it originally enacted the ADEA and later amended it, and not under the powers of Section Five of the Fourteenth Amendment as was the case with the Civil Rights Act and its amendments.

II. THE INTERESTS OF THE STATE AND LOCAL GOVERNMENTS FAR OUTWEIGH THE FEDERAL INTEREST IN THIS MATTER.

The states' power to staff its public safety forces with those individuals best fit for the job is indisputably an attribute of state sovereignty. The state and local governments do not claim, as Appellants repeatedly allege,[7] the power to arbitrarily discriminate on the basis of age as an attribute of State sovereignty. The Constitution already prohibits such arbitrary discrimination. *Massachusetts Board of Retirement v. Murgia, supra,* 427 U.S. at 312. The attribute of state sovereignty which state and local governments wish to preserve is the power to employ in their public safety forces those individuals best able to carry out their arduous duties. The ADEA goes far beyond the Constitutional requirement that states not arbitrarily discriminate on the basis of age and greatly burdens local governments' employment decisions in this most crucial area. Retirement ages which have been upheld as being rationally related to legitimate governmental objectives have been rejected when compelled to meet the Bona Fide

[6]Reorganization Plan No. 1 of 1978, 43 F.R. 19807, 92 Stat. 3781, reprinted in 1978 U.S. Code Cong. & Adm. News 9795-9797.

[7]Appellants Brief at 4, 5, 11, 12, 15, 19.

Occupational Qualification standard of the ADEA. The ADEA does not, as Appellants benignly contend, merely prohibit arbitrary discrimination based on age. The Constitution already does this. The ADEA places a much heavier burden on state and local government. (Compare, *Massachusetts Board of Retirement v. Murgia, supra,* retirement of state police at age 50 upheld as rational, with *Johnson v. Mayor of Baltimore,* 515 F.Supp. 1287 (D. Md. 1981), retirement of firefighters at age 55 held violative of the ADEA.)

The most direct manner in which the ADEA impairs the ability of local governments to provide adequate public safety protection to their citizens is that it forces these governments to hire and retain on the payroll those individuals whom the local governments believe are no longer vigorous enough to perform their duties. It is commonly held medical knowledge that physical ability declines with age. With progressing age, reaction time diminishes, and auditory and visual perception decrease. Loss of memory, particularly short term memory, is common. Speed, agility, stamina, and endurance decline. Cognitive functions and physical motor skills also decline. A person's ability to react quickly and efficiently while under physical or mental strain declines with age.

The ability to handle certain aspects of police work cannot be reliably tested. It is impossible to duplicate, for testing purposes, high stress situations, such as an encounter with an armed suspect, that police officers may experience in the field.

To protect adequately their citizens, local governments must have young and vigorous public safety forces. Congress' imposition of the ADEA on state and local government employers destroys their ability to staff their public safety forces with the fittest possible individuals.

As local governments' budgets are being cut because of diminished Federal aid, expenditures on public safety are being tightly controlled. Since a large portion of the local governments' budgets is for salaries, the number of public safety personnel is necessarily being limited, in this an era of ever increasing crime. In such an environment it is imperative that those personnel local government can afford to hire are the fittest possible.

The Federal government itself retires its public safety personnel at age 55, including F.B.I. agents and firefighters. P.L. 93-350, Section 4. In the Senate Report accompanying this legislation, Congress stated the very rationale for early retirement which your amicus puts forward in its brief:

> The history of retirement legislation dealing with law enforcement officers and firefighters shows congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age 50. This intent has been based on the nature of the work involved and the determination that these occupations should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands which are far more taxing physically than most in Federal Service. They are occupations calling for strength and stamina of the young rather than the middle aged.[8]

The United States Government is thus in the anomalous position of attempting to force upon state and local governments a policy which the Federal government does not itself subscribe to. The importance of early retirement ages for Federal public safety personnel applies with equal, if not more, force to the public safety personnel of state and local governments.

[8]S. Rep. No. 93-948, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Adm. News 3699.

The imposition of the ADEA upon local governments will have a substantial financial impact as well, which in turn impairs the ability of local governments to deliver traditional governmental services.

The most notable financial impact on local governments is in the area of employee compensation. The imposition of the ADEA on local governments undoubtedly will increase the average employee's length of service. Since compensation, fringe, and pension benefits often are related to length of service, the cost of salaries and fringe benefits per employee increases with the imposition of the ADEA on local governments. The inevitable result will be that local public safety forces will be staffed by fewer older individuals instead of more numerous younger individuals.

The ADEA will impose other financial costs as well. Since the imposition of the ADEA on local governments will cause the median age of public safety forces to rise, the cost of life and health insurance will also rise, since premium costs are directly related to age.

The increased costs of insurance will result in cuts in other portions of the public safety budget, the concomitant result being a decrease in the delivery of essential services to the citizens of this Nation. In general, the ADEA imposes costs on local governments which will result in a reduction in the number of on-line public safety personnel at a time when our citizens need more, not less, protection.

The ADEA causes other deleterious effects on the quality of local governments' public safety forces. With their ability to retire individuals at an early age emasculated, local governments will be faced with a situation where employees are ensconced in upper level positions for longer periods of time. The input of new thoughts and fresh ideas will be limited as the same individuals remain in policymaking positions for longer periods of time.

In addition, promotional opportunities for those in lower-level positions will be restricted. Individuals qualified for upper level positions will be compelled to remain in positions unreflective of their true skills. Being forced to remain at job levels for which they are "over-qualified" will lead to severe morale problems within the public safety forces.

This Court has recognized that the ability to assure that opportunities for promotion are available to government employees serves important and legitimate governmental objectives:

> Aiming at superior achievement can hardly be characterized as illegitimate and it is equally untenable to suggest that providing promotion opportunities through the selection-out process and through early retirement does not play an acceptable role in the process. *Vance v. Bradley,* 440 U.S. 93, 101 (1979).

The imposition of the ADEA upon local government erodes the morale of public safety personnel and lessens the quality of the service provided. An early and fixed mandatory retirement age creates predictable promotion opportunities which in turn insure a continual input of fresh ideas and spur morale among lower-level employees. *Vance v. Bradley,* 400 U.S. at 98.

The Appendix to this Brief contains a list of the retirement ages of the public safety officers in municipalities across the Nation. The list reflects the diversity of the Nation itself; the nature of police work depends upon the characteristics of each particular community. The imposition of the ADEA upon local governments will have the effect of destroying this diversity and replacing it with a Federal standard. While some individuals may benefit by having their length of employment extended by a few years, the Nation as a whole will suffer the consequences of inadequate police and fire protection.

CONCLUSION

For the foregoing reasons, the Judgment of the District court should be affirmed.

Respectfully submitted,

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May 1982

APPENDIX

LIST OF COMPULSORY RETIREMENT AGES FOR POLICE AND FIREFIGHTERS

(Cities listed alphabetically within population breakdown)

MUNICIPALITY	RETIREMENT AGE POLICE	FIREFIGHTERS
Over 1,000,000		
Chicago, IL	63	63
Los Angeles, CA	60	60
Philadelphia, PA	70	
500,000 - 1,000,000		
Baltimore, MD	55	55
Denver, CO	65	65
Honolulu, HI	70	70
Indianapolis, IN	65	65
Jacksonville, FL	65	65
Memphis, TN	60	60
San Diego, CA	65	65
San Francisco, CA	65	65
St. Louis, MO	60	60
Washington, DC	60	60
250,000 - 500,000		
Charlotte, NC	70	70
Colorado Springs, CO	60	60
Fort Worth, TX	70	70
Long Beach, CA	60	60
Minneapolis, MN	65	65
Nashville, TN	60	60
Norfolk, VA	62	62

Oklahoma City, OK	65	70
Omaha, NB	62	62
Pittsburgh, PA	65	65
Portland, OR	64	64
100,000 - 250,000		
Albany, NY	70	70
Allentown, PA	65	65
Amarillo, TX	[illegible]	65
Anaheim, CA	60	60
Anchorage, AK	55	55
Arlington, TX	70	70
Aurora, CO	65	65
Beaumont, TX	65	65
Chesapeake, VA	60	60
Columbia, SC	65	65
Davenport, IA	65	65
Dayton, OH	70	70
Duluth, MN	65	65
Eugene, OR	60	60
Fort Lauderdale, FL	50	50
Fresno, CA	60	60
Greensboro, NC	62	62
Hampton, VA	65	65
Hialeah, FL	65	65
Huntington Beach, CA	60	60
Knoxville, TN	65	65
Lansing, MI	60	60
Lincoln, NB	70	70
New Haven, CT	65	65
Newport News, VA	63	63
Pasadena, CA	60	60

Raleigh, NC	65	65
Riverside, CA	60	60
Roanoke, VA	70	70
Rockford, IL	65	65
San Bernardino, CA	60	60
Springfield, MO	60	60
Stockton, CA	60	60
Tacoma, WA	60	60
Torrance, CA	60	60
Virginia Beach, VA	55	55
Waco, TX	65	65
Wilmington, DE	70	70
50,000 - 100,000		
Alameda, CA	60	60
Alhambra, CA	65	65
Ann Arbor, MI	60	60
Baytown, TX	70	70
Billings, MT	65	65
Burbank, CA	60	60
Compton, CA	60	60
Daly City, CA	70	70
Danbury, CT	65	65
Daytona Beach, FL	60	60
Decatur, IL	63	63
Durham, NC	65	65
East Orange, NJ	65	65
East Providence, RI	60	60
El Monte, CA	60	60
Elgin, IL	65	65
Fargo, ND	70	70
Fayetteville, NC	65	65
Glendale, CA	60	60

Greenville, SC	65	65
Mesa, AZ	70	70
Midland, TX	70	70
Midwest City, OK	70	70
Modesto, CA	55	55
Mountain View, CA	65	65
Oceanside, CA	60	60
Overland Park, KS	55	55
Owensboro, KY	65	65
Pompano Beach, FL	60	60
Pontiac, MI	62	62
Pueblo, CO	60	60
Saginaw, MI	70	70
Salinas, CA	65	65
Santa Rosa, CA	65	65
Scottsdale, AZ	70	70
Simi Valley, CA	60	60
Tuscaloosa, AL	65	65
Waukegan, IL	65	65
Wauwatosa, WI	60	60
West Hartford, CT	65	65
White Plains, NY	62	62
25,000 - 50,000		
Aberdeen, SC	70	70
Allen Park, MI	57	57
Ames, IA	65	65
Antioch, CA	60	60
Arcadia, CA	65	65
Battle Creek, MI	65	65
Beverly Hills, CA	60	60
Big Spring, TX	65	65
Brooklyn Park, MN	65	65

Bryan, TX	70	70
Cape Girardeau, MO	65	65
Carlsbad, CA	65	65
Charlottesville, VA	60	60
Coon Rapids, MN	63	63
Cumberland, MD	70	70
Danville, IL	70	70
Del City, OK	65	65
Delray Beach, FL	65	65
Eau Claire, WI	55	55
Emporia, KS	70	70
Enfield, CT	70	70
Escondido, CA	60	60
Gadsden, AL	60	60
Goldsboro, NC	70	70
Highland Park, IL	65	65
Huntsville, TX	70	70
Lakewood, NJ	65	65
Lewiston, ME	62	62
Lodi, CA	60	60
Manhattan Bch., CA	60	60
Medford, OR	60	60
Meridian, MS	65	65
Middletown, CT	65	65
Minot, ND	60	60
Moline, IL	60	60
Mt. Lebanon, PA	60	60
Murfreesboro, TN	55	55
Murray City, UT	70	70
New Berlin, WI	55	55
North Miami, FL	65	65
Norwich, CT	70	70
Palm Springs, CA	60	60

Parma Heights, OH	70	70
Quincy, IL	65	65
Redding, CA	65	65
Renton, WA	55	55
Rock Hill, SC	70	70
Rockville, CT	70	70
Rome, GA	70	70
San Marcos, TX	70	70
Shaker Hts., OH	70	70
Spartanburg, SC	65	65
Teaneck, NJ	65	65
Vancouver, WA	60	60
Vista, CA	65	65
Walnut Creek, CA	60	60
West Allis, WI	55	55
Willington, NC	65	65
Woonsocket, RI	65	65
Yuma, AZ	70	70
10,000 - 25,000		
Aberdeen, WA	65	65
Bay Village, OH	65	65
Brattleboro, VT	65	65
Clovis, CA	65	65
Columbus, MO	65	65
Creves Coeur, MO	65	65
Durango, CO	70	70
Eufaula, AL	65	65
Freeport, TX	65	65
Grafton, WI	60	60
Grants Pass, OR	60	60
Greenbelt, MD	70	70
Grosse Pointe Woods, MI	60	60

Hermosa Bch., CA	60	60
Lake Oswego, OR	60	60
Lea, MN	60	60
Los Altos, CA	60	60
Maumee, OH	70	70
Menasha, WI	55	55
Merriam, KS	70	70
Morton, IL	60	60
Moscow, ID	70	70
Newport, OR	60	60
Norton Shores, MI	60	60
Olney, IL	55	55
Pendleton, OR	60	60
Pittsburg, KS	70	70
Port Angeles, WA	60	60
Rockville, MD	60	60
Roseburg, OR	60	60
Salisbury, MD	70	70
Scottsbluff, NB	60	60
Sterling, CO	65	65
Woodstock, IL	55	55
Wooster, OH	65	65
Under 10,000		
Harrison, NJ	65	65
Oak Brook, IL	65	65
Post Falls, ID	65	65
Tarboro, NC	70	70
Watseka, IL	65	65

Docket Sheet

NO. 81-554-ADX	TITLE Equal Employment Opportunity Commission, Appellant v. Wyoming, et al.

DOCKETED	COURT
Sept. 17, 1981	United States District Court for the District of Wyoming

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellant: Solicitor General
	Counsel for Appellees: Steven F. Freudenthal
Aug. 4, 1981	Application for extension of time to docket an appeal filed, and order granting same until 9/17/82, by White, J., 8/4/81.
Sept. 17, 1981	Statement as to jurisdiction filed. (Record filed).
Oct. 28, 1981	DISTRIBUTED. 11-13. (Stricken)
Nov. 10, 1981	Response requested.
Dec. 10, 1981	Motion to affirm filed.
Dec. 16, 1981	DISTRIBUTED. 1-8.
Jan. 11, 1982	Probable jurisdiction NOTED.

Jan. 22, 1982	Motion of the parties to dispense with printing the joint appendix filed.
Jan. 27, 1982	DISTRIBUTED. 2-19. (Above motion).
Feb. 22, 1982	The motion of the parties to dispense with printing the joint appendices is GRANTED.
Feb. 26, 1982	Order extending time to file the appellant's brief on the merits until March 25, 1982.
Mar. 24, 1982	Order further extending time to file the appellant's brief on the merits until Apr. 2, 1982.
Apr. 2, 1982	Brief, amicus curiae, of The American Federation of State, County and Municipal Employees, AFL-CIO filed.
Apr. 2, 1982	Brief for appellant, EEOC, filed.
Apr. 26, 1982	Order extending time to file the appellees' brief on the merits until May 14, 1982.
May 14, 1982	Brief, amicus curiae, of The National Institute of Municipal Law Officers in support of respondet, State of Wyoming filed.
May 17, 1982	Brief, amici curiae, of the State of Alabama, Arizona, et al in support of appellees filed.
May 17, 1982	Brief, amicus curiae, of the City of Baltimore in support of appellees filed.
May 17, 1982	Brief, amici curiae, of the State of California and Alabama in support of appellees filed.
May 17, 1982	Brief for appellees State of Wyoming, et al. filed.
May 17, 1982	Brief, amici curiae, of The County of Marathon, Wisconsin, et al. in support of appellees filed.
July 13, 1982	CIRCULATED.
	(Over)

81-554

Title

No.

DATE	PROCEEDINGS AND ORDERS
Sept. 23, 1982	Reply memorandum of appellant EEOC filed. (D).
Sept. 30, 1982	Supplemental brief for respondents State of Wyoming, et al. filed. (D).
Oct. 5, 1982	ARGUED.